TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~311~~ 54.

MARTIN CONBOY, AS TRUSTEE IN BANKRUPTCY OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, BANKRUPT, APPELLANT,

vs.

FIRST NATIONAL BANK OF JERSEY CITY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

FILED JUNE 22, 1905.

(19,811.)

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SUPREME COURT OF THE UNITED STATES.

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vs.

FIRST NATIONAL BANK OF JERSEY CITY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILIP SEMMER GLASS COMPANY, LTD., Bankrupt. MARTIN CONBOY, Trustee, Appellant.

Transcript of Record.

Appeal from the District Court of the United States for the Southern District of New York.

Printed Under the Direction of the Clerk.

1 United States District Court, Southern District of New York.

In the Matter of the Petition of NEWARK GLASS COMPANY ET AL. to have PHILLIP SEMMER GLASS COMPANY Adjudged Bankrupt.

Statement.

1904.
May 23. Filed Referee's report on questions to be reviewed *In re* claim of First National Bank of Jersey City.
May 27. Filed notice of motion on petition to review Referee's order. Referee's order affirmed (Memo. Holt, *J.*)
June 7. Filed order affirming ruling of Referee allowing claim.
June 9. Filed assignment of errors.
June 11. Filed petition and allowance of appeal.
June 11. Filed citation on appeal.

2 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS CO., LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

I, Macgrane Coxe, one of the Referees of said Court in Bankruptcy, do hereby certify that in the course of the proceedings in said cause before me there arose a question pertinent to the said proceedings, which question, together with a summary of the evidence relating thereto and the findings and order of the Referee thereon, are set forth in the opinion and order hereto annexed.

And the said question is certified to the Judge for his opinion thereon.

Dated at the County of New York, on the 23d day of May, A. D. 1904.

(Signed) MACGRANE COXE,
Referee in Bankruptcy.

3 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS CO., LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

Claim of First National Bank of Jersey City.

Wilson & Wallis, for the bank.
Frank A. Clark, for the trustee.

MACGRANE COXE, *Referee:*

This is on the application of the trustee in bankruptcy for the re-examination of the claim against the bankrupt estate of the First National Bank of Jersey City.

The petition in bankruptcy, which was involuntary, was filed March 18, 1903. For some time prior to that date the bankrupt had had a deposit account in the claimant bank, and on said March 18, 1903, there was a balance due to the bankrupt from the bank on this account of $6,232.96. On the same day the bank held unmatured promissory notes made by various makers in favor of the bankrupt, which it had, upon endorsement by the bankrupt, and in the ordinary course of business, discounted for the bankrupt's account, and on which the bankrupt had received from the bank a sum largely in excess of the balance above mentioned. This bal-
4 ance the bank applied to the payment of these notes as far as it would go, and it has filed its claim, which is the subject of this proceeding for the remainder of the notes, amounting in all, including interest and protest fees, to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy. Payment thereon respectively was duly demanded and refused, and notice of protest given to the bankrupt as endorser.

The objections of the trustee are based upon the fact that the notes were unmatured on the day the petition in bankruptcy was filed. He urges that, for this reason, it was not within the right of the bank to offset the deposit in its hands against the indebtedness of the bankrupt on the endorsements, and that should it be permitted to do so, the result would be an unlawful transfer and a preference of the bank to the extent of the deposit over the bankrupt's other creditors of the same class.

It seems now well settled, and, indeed, the trustee does not deny that, had the notes fallen due before instead of after the filing of the petition, the offset would have been proper. There are a number of decisions to this effect, both under the present and the former Bankruptcy Acts (Hough *v.* First National Bank, 4 Biss., 349; Blair *v.* Allen, 3 Dill., 101; *In re* Farnsworth, 5 Biss., 224; *In re* Little, 6 Am. B. R., 681, 692; 110 F. R., 621; *In re* Elslasser, 7 Am. B. R., 215). And so, finally, is the decision of the Supreme Court of the United States in the recent case of New York County National Bank *v.* Massy (11 Am. B. R., 42; 192 U. S., 138). The ground of the

decision in this last case is that the bankrupt's deposit in the bank, under the circumstances, did not constitute a transfer as defined by the Bankruptcy Act, for the reason that the estate of the bankrupt was not diminished thereby, the bankrupt being at liberty freely to check against the deposit in the bank up to the time of the institution of the bankruptcy proceedings. The Court thereupon held that there was such mutuality between the two debts as permitted
5 one to be set-off against the other under Section 68 of the act.

This decision disposes of the objection of the trustee that the deposit here was a preferential transfer, and we have remaining only the question as to whether the fact that the notes here were unmatured at the time of the filing of the petition in bankruptcy eliminates that quality of mutuality which is required by Section 68, in order to permit of set-off.

The trustee's contention is that on the day of the filing of the petition there was no such mutuality; that there was, on that day, a debt due by the bank to the bankrupt, but no debt due by the bankrupt to the bank. He further contends that immediately upon the filing of the petition in bankruptcy other and paramount equities in favor of the general creditors of the bankrupt intervened, and became superior to the equities existing between the bankrupt and the bank; and that immediately thereupon the fund in the bank became impressed with a trust in favor of the general creditors of the bankrupt and could not be retained by the bank alone.

The trustee in support of this contention cites authorities of the New York and Pennsylvania courts, and there is no doubt that under the statutes of those States, the law is as he declares it to be. But the Bankruptcy Act creates a different rule of set-off, or rather, perhaps, better, adds to the classes of cases to which the rule is to be applied.

At common law, and under the statutes of New York and of other States, it is well settled that there can be no set-off unless the mutual debts are both due and payable in the hands of the parties for and against whom set-off is sought, that is to say, that unless they are presently payable as well as due the requisite mutuality does not exist (Munger *v.* Albany City Bank, 85 N. Y., 580-586). Under the Bankruptcy Statute, however, by Section 63*a*, a debt is declared provable against the bankrupt estate, that is, I take it, for the purposes of bankruptcy, payable out of the estate, although not
6 by its terms payable until after the filing of the petition, if only it be absolutely owing at that time. The operation of this section seems to be to hasten in such cases, and for the purposes of bankruptcy administration, the maturity of the debt.

In the case of Meyer *v.* Dickinson, 5 Am. B. R., 593; 107 F. R., 86, Judge Thomas maintained the right of set-off in such a case as the one under consideration against unmatured paper of the bankrupt firm, holding that upon the institution of bankruptcy proceedings another and different rule of set-off applied from that existing under the statutes of Pennsylvania.

It seems to be the provability of the debt which is the criterion of its availability for the purposes of set-off. It was so said *In re* Kalter, 2 N. B. N., 264, in which case such an offset as is sought here was

upheld. The fact that Section 68*b* prohibits a set-off of any debt which is not provable would point inferentially to the same conclusion.

There seems now to be no question, though it was at first much doubted, that the claim of the bank in this case is a provable claim, notwithstanding the immaturity of the paper at the date of the commencement of the bankruptcy proceedings. It was so held *In re* Gersen, 6 Am. B. R., 11; 107 F. R., 897. The Circuit Court of Appeals for the Third Circuit in that case, affirming the District Court, holds that the liability of a bankrupt endorser of commercial paper can be proved against his estate in bankruptcy, although the paper did not fall due until after the filing of the petition.

Nor should we overlook the use of the term "mutual credits" in addition to the term "mutual debts" in Sec. 68. While these terms are to be used as correlatives (Libby *v.* Hopkins, 104 U. S., 303), they are not to be construed as meaning one and the same thing (Lord Kenyon in Atkinson *v.* Elliott, 7 T. R., 378). The term mutual credits first appears in the English Bankruptcy System in the year 1705 (4 & 5 Anne, C. 17, Sec. 11), and it has been found in
7 all of our bankruptcy acts from the beginning (Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073). It has from the first been considered of importance, and as adding materially to the cases which were held comprised under the terms mutual debts. Thus, Robson on Bankruptcy, 7th Edition, p. 365, says:

"The right of set off given by the Bankruptcy laws, not being confined, as in the statutes of set-off, to mutual debts, but being extended to mutual credits * * * it necessarily applies to a much larger number of demands than is comprised in the term mutual debts. * * * One of the earliest questions which arose on the mutual credit clause was whether a debt payable *in futuro* could be set-off against a debt payable *in præsenti*. And this was decided in the affirmative on the ground that, though there might not be mutual debts actually payable between the parties, still there were mutual credits, and that the case came within the equities of the statute."

Under Sec. 20 of the Act of 1867, the language of which is substantially the same to that of Sec. 68 of the present act, such an offset as is here sought by the bank against an unmatured obligation was upheld (*Ex parte* Howard National Bank, 2 Lowell, 487; *In re* Petrie, 5 Ben., 110).

On the whole, I conclude that the mutuality required by the Bankruptcy Act existed, and that the offset was proper.

Objection is further made by the trustee, as to several of the notes, that they had not become due even at the time of the proof of claim was made, June 11, 1903. This is true, but they had all become due before the proof was closed in this proceeding, and it appears from the record that these notes, like the others, had been duly protested for non-payment, with notice to the bankrupt. These notes, therefore, are substantially in the same situation as the others, and
8 it follows that the same rules should apply to them.

All of the notes we have seen fell due within one year from

the date of the adjudication. It is not, therefore, necessary to decide, and is not decided what would be the result were this not the case, as affected by Section 57*n* of the Bankruptcy Act.

There should, however, be a deduction from the claim as filed. Under Section 63*a* there should be a deduction of interest on the several notes between the date of the filing of the petition and the maturity of the notes, respectively. This amounts to $110.76, and should be deducted from the amount of $9,080.03, set forth in the claimant's proof of claim. With this deduction the claim should be allowed.

An order may be submitted accordingly on notice or consent.

New York, May 7, 1904.

MACGRANE COXE,
Referee in Bankruptcy.

9 In the District Court of the United States for the Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

At the City of New York, in said district, on the 13th day of May, 1904:

The trustees of the above named bankrupt having filed a petition and notice for the re-examination and rejection of the claim of the First National Bank of Jersey City, a creditor, against the estate of the said bankrupt; now, upon the evidence submitted to this Court upon the said claim and upon hearing counsel therein, it is

Ordered, that the amount of the said claim be reduced from $9,080.03, as set forth in the affidavit in proof of the claim filed by said creditor by deducting therefrom the sum of $110.76, the interest on the several notes set forth in the said affidavit between the date of filing the petition and the maturity of the notes, respectively, and by deducting the further sum of $450, the amount of the note of George H. Payne, which, as stipulated by counsel, has been collected by the creditor since the filing of its claim, making a total deduction of $560.76, and that the said claim as so reduced, amounting to $8,519.27, be and it is hereby allowed, and that the last mentioned sum be entered upon the books of the trustee as the true sum upon which dividends shall be computed.

MACGRANE COXE,
Referee in Bankruptcy.

10 United States District Court, Southern District of New York.

In the Matter of THE PHILLIP SEMMER GLASS COMPANY, Bankrupt.

In Bankruptcy. No. 5757.

To Macgrane Coxe, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner is the trustee of the above named bankrupt, and as such trustee filed a petition herein to expunge the
11 claim of the First National Bank of Jersey City, a creditor of the above named bankrupt.

That on the 13th day of May, 1904, an order denyink gaol

That on the 13th day of May, 1904, an order denying the said petition, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous, in that at the time of the filing of the petition in bankruptcy said bankrupt had on deposit in said bank the sum of $6232.96, payable on demand to it or to its order by check or otherwise.

That said bank refused to pay said deposit or any part thereof to the receiver of said bankrupt or to the trustee herein, but claimed the right under Section 68 of the Bankruptcy Act to apply said deposit as a set-off to the bankrupt's liability to, the bank on certain promissory notes made to the order of said bankrupt, and by it sold at discount and endorsed to said bank before the bankruptcy, and then held and still held by said bank. That said notes did not mature until after the filing of the petition in bankruptcy, and the bankrupt's liability thereon was not a mutual debt or a mutual credit between the estate of the bankrupt and said bank. And that said bank had not the right to apply said deposit as a set-off thereon or thereto. That said petition to expunge said claim should have been granted unless the bank withdrew said claim of set-off and paid the said deposit to the trustee.

And for the further reason that the application of the amount of said deposit as aforesaid to the payment of certain of the promissory notes so as aforesaid in possession of said bank and not matured at the date of the filing of the petition in bankruptcy was an undue and unlawful preference within the meaning of the bankruptcy statute and said bank should not have been allowed to prove any claim against the estate of said bankrupt until the repayment to the said estate of the amount so applied on the said promissory notes.

12 And for the further reason that on the 18th day — March, 1903, the duly appointed receiver in bankruptcy of the above named bankrupt demanded from said bank a surrender of the amount then on deposit to the credit of the above named bankrupt in said bank, which was the sum of $6,232.96, compliance with which said demand was refused and has been continuously refused by said bank.

And for the further reason that the said bank having received

the said preferences and transfers as above set forth, did not at any time surrender such preferences and transfers as required by the bankruptcy statute as a condition precedent to the proving of said claim.

And for all the other and further reasons contained in the objections to the claim of said bank filed by your petitioner on or about the 12th day of September, 1903.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Law of 1898 and General Order XXVII.

Dated May 17, 1904.

MARTIN CONBOY, *Petitioner.*

UNITED STATES OF AMERICA,
County and Southern District of New York, ss:

I, Martin Conboy, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

MARTIN CONBOY.

Subscribed and sworn to before me this 17th day of May, 1904.

EDWARD F. MAGOFFIN,
[SEAL.] *Notary Public, New York Co.*

13 (Copy.)

$601.17/100. NEW YORK, *January 3d,* 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Six hundred and one 17/100 Dollars at the Lincoln National Bank.

Value received.

H. C. BROWNING.

No. Due May 3.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$269.30/100. NEW YORK, *January 10th,* 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co. Two hundred and sixty-nine 30/100 Dollars, at 3638 Park Ave., N. Y. City.

Value received.

GEO. G. WACKER.

No. Due Apr. 10.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$601.17/100. NEW YORK, *January* 9, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Six hundred and one 17/100 Dollars, at the Lincoln National Bank.
Value received.

H. C. BROWNING.

No. Due May 9.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

14 $1.25 fees.

$201.25. $200.00.

N. Y., *January* 12*th* 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., Two hundred 00/. Dollars, at The New York Produce Exchange Bank.
Value received.

F. C. LOMONTE.

No. Due —.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres. New York City.

$349.00/100. NEW YORK, *Jan.* 12*th*, 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., $349.00, Three hundred and forty-nine Dollars, at the Colonial Bank.
N. W. Corner Columbus Ave. & 83rd St., New York.
Value received.

WALTER STABLER.

No. Due Apr. 12/03.

(Endorsed:) Phillip Semmer Glass Co., Ltd., P. Anthony Brock, Treas.

$483.10. BROOKLYN, N. Y., *Jan'y* 21, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Four hundred and eighty-three 10/100 Dollars, at Hamilton Trust Co., Brooklyn, N. Y.
Value received.

POTTS & PARTRIDGE.

No. Due May 21.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

15 $384.74. NEW YORK, *Feb'y* 5, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Three hundred and eighty-four 74/100 Dollars, at the Lincoln National Bank.
Value received.

H. C. BROWNING.

No. Due June 5.

(Endorsed:) Phillip Semmer Glass Co., Jno. P. Semmer, Pres.

$493.65/100. N. Y., *January 24th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Four hundred and ninety-three 65/ Dollars, at the Jefferson Bank of New York.
Value received.

Z. K. BERLIN.

No. Due May 24.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$597.37. NEW YORK, *Feb.* 6, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Gl. Co., Ltd., Five hundred and ninety-seven 37/100 Dollars, at the Mechanics & Traders' Bank.
Value received.

K. C. BROWN.

No. Due June 6.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

16 $425.00. FEBRUARY 9TH, 1903.

Four months after date, I promise to pay to the order of Phillip Semmer Glass Co., Lim., Four hundred and twenty-five Dollars at The 23rd Ward Bank, N. Y.
Value received.

W. C. HUNTER.

No. Due June 9.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$498.93. NEW YORK, *February 13th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Four hundred ninety-eight and 93/100 Dollars at The Jefferson Bank of New York.
Value received.

Z. K. BERLIN.

No. Due June 13th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$350.00. NEW YORK, *February 17th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co. Three hundred and Fifty & 00/100 Dollars at Twelfth Ward Bank.

Value received.

GILBERT E. ORCUTT.

No. Due June 17th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

17 $651.39 NEW YORK, *February 16th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co., Ltd., Six hundred fifyty-one & 39/100 Dollars at Mechanics & Traders' Bank.

Value received.

K. C. BROWN.

No. Due June 16th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$323.60/100. N. Y., *Feb'y 20th*, 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., Three hundred and Twenty-three and 60/100 Dollars at The Jefferson Bank of New York.

Value received.

Z. K. BERLIN.

No. Due May 20.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

$425.00. NEW YORK, *February 20th*, 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co., Limited, Four hundred and twenty-five & 00/100 Dollars, at the 23rd Ward Bank, N. Y.

Value received.

W. C. HUNTER.

No. Due June 20th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

18 $489.20. NEW YORK, *February* 18, 1903.

Four months after date I promise to pay to the order of P. Semmer & Co. Four hundred and eighty-nine & 20/100 Dollars, at West Side Bank.
Value received.

PETER WAGNER,
247 *West* 127*th St.*

No. . Due June 18th.

(Endorsed:) P. Semmer & Co.—Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$735.88/100. NEW YORK, *Feb.* 27*th,* 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co. Seven hundred and thirty-five 88 Dollars, at Colonial Bank.
Value received.

WALTER STABLER.

No. Due May 27/03.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Prest.

$283.28. NEW YORK, *March 6th,* 1903.

Four months after date I promise to pay to the order of Phillip Semmer Glass Co., Limited, Two hundred and eighty-three and 28/100 Dollars, at West Side Bank.
Value received.

PETER WAGNER,
247 *West* 127*th St.*

No. Due July 6th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

19 $468.34. BROOKLYN, NEW YORK, *March 4th,* 1903.

Four months after date we promise to pay to the order of Phillip Semmer Glass Co. Four hundred and sixty-eight and 34/100 Dollars, at Hamilton Trust Co., Brooklyn, N. Y.
Value received.

POTTS & PARTRIDGE.

No. Due July 4th.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.—First National Bank, Jersey City, N. J.

$450.00. March 9th, 1903.

Three months after date I promise to pay to the order of Phillip Semmer Glass Co., Ltd., Four hundred and fifty 00/100 Dollars at Citizens' Trust Co., Paterson, N. J.

Value received.

GEO. H. PAYNE.

No. Due —.

(Endorsed:) Phillip Semmer Glass Co., Ltd., Jno. P. Semmer, Pres.

20 In the District Court of the United States for the Southern District of New York.

In the Matter of The Philip Semmer Glass Company, Limited, Bankrupt.

At Jersey City, in the District of New Jersey, on the — day of June, 1903, came George W. Conklin, and made oath and says: That he resides at Hackensack, in the State of New Jersey, and that he is the cashier of the First National Bank of Jersey City, a corporation organized under the laws of the United States and carrying on business as a national banking association at Jersey City, Hudson County, New Jersey, and that he is duly authorized to make this proof. That the above named Philip Semmer Glass Company, Limited, the corporation against which a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said bank in the sum of nine thousand and eighty 03/100 ($9,080.03) dollars, with interest; that the consideration of the said debt is as follows:

That at the dates specified in the annexed schedule, marked "A," and made part of this proof, the said bank, in the usual course of its business, at the request of said bankrupt, discounted and paid to or placed to the credit of the said bankrupt the proceeds of promissory notes, made by the makers named, and for the amounts specified in the said schedule, all of which were duly endorsed
21 by said bankrupt and delivered so endorsed, before maturity and for value, to the said bank, which is now the lawful owner and holder thereof; that no part of said notes has been paid, except the sum of nineteen 28/100 ($19.28) dollars, which has been credited on account of the note of G. G. Wacker, leaving a balance due on said note of $250.02, and the total amount of said notes $9,060.94; copies of said notes are hereto annexed; that at the dates of maturity of such of said notes as have matured, said dates being the due dates specified in said schedule, the said matured notes were duly presented for payment, and payment duly demanded, but was refused, and thereupon the said notes were duly protested for non-payment, and due notice thereof was given to said bankrupt, at an expense for protest fees as stated in said schedule, amounting to the sum of nineteen 09/100 ($19.09) dollars, making a total indebtedness of nine thousand eighty 03/100 ($9,080.03) dollars;

that there are no counterclaims or offsets to the same; and that the said bank has not, nor has any person by its order, or to the knowledge or belief of this deponent, for its use, had or received any manner of security for said debt whatever, except that judgment has been recovered in the City Court of New York in favor of the said bank against F. C. Lamonte, named in said schedule, upon his note therein specified, and execution has been issued upon said judgment, but has not been returned.

G. W. CONKLIN,
[SEAL.] *Cashier of First National Bank of Jersey City.*

Subscribed and sworn to before me this 11th day of June, 1903.
RAYMOND DAWSON,
[SEAL.] *Notary Public of N. J.*

22 SCHEDULE A.

Maker.	Date 1903.	Time.	Due 1903.	Amount.	Protest fees.
H. C. Browning	Jan. 3	4 mo.	May 3	$601 17	$1 50
G. G. Wacker	Jan. 10	3 "	Apr. 10	269 30	1 30
H. C. Browning	Jan. 9	4 "	May 9	601 17	1 50
F. C. Lamonte	Jan. 12	3 "	Apr. 12	200 00	1 25
W. Stabler	Jan. 12	" "	Apr. 12	349 00	1 50
Potts & Partridge	Jan. 21	4 "	May 21	483 10	1 50
H. C. Browning	Feb. 5	" "	June 5	384 74	1 50
Z. K. Berlin	Jan. 24	" "	May 24	493 65	1 50
K. C. Brown	Feb. 6	" "	June 6	597 37	1 50
W. C. Hunter	Feb. 9	" "	June 9	425 00	1 50
Z. K. Berlin	Feb. 13	" "	June 13	498 93	
G. E. Orcutt	Feb. 17	" "	June 17	350 00	
K. C. Brown	Feb. 16	" "	June 16	651 39	
Z. K. Berlin	Feb. 20	3 "	May 20	323 60	1 50
W. C. Hunter	Feb. 20	4 "	June 20	425 00	
Peter Wagner	Feb. 18	" "	June 18	489 20	
W. Stabler	Feb. 27	3 "	May 27	735 88	1 50
P. Wagner	M'ch 6	4 "	July 6	283 28	
Potts & Partridge	M'ch 4	" "	July 4	468 34	
Geo. H. Payne	M'ch 9	" "	June 9	450 00	54
				$9,080 12	$19 09

G. W. CONKLIN,
Cashier of First National Bank of Jersey City.

23 United States District Court, Southern District of New York.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt. In Bankruptcy.

To the First National Bank of Jersey City, N. J., as Creditor, and Wilson & Wallis, Esqs., its Attorneys:

You will please take notice that Martin Conboy, the trustee herein, has filed a petition asking that your claim against the Phillip Sem-

mer Glass Company, Ltd., the above named bankrupt, be reconsidered and rejected, and that a hearing will be had on such petition at my office, No. 63 Wall street, in the Borough of Manhattan, City, County and State of New York, in said district, on the 17th day of September, 1903, at 10.30 o'clock A. M.

Dated September 12, 1903.

MACGRANE COXE,
Referee in Bankruptcy.

24 United States District Court, Southern District of New York.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt. In Bankruptcy.

To Macgrane Coxe, Esq., Referee in Bankruptcy.

Your petitioner respectfully shows that he is the Trustee of the above-named bankrupt; that the proof of debt of the First National Bank of Jersey City, claiming to be a creditor of the said Phillip Semmer Glass Company, Limited, was filed herein on the 12th day of June, 1903.

That the said claim should not have been allowed, for the following reasons:

1. Because, according to the proof of claim filed by said First National Bank of Jersey City, and verified by its cashier, George W. Conklin, on the 11th day of June, 1903, the said bank claimed upon certain notes drawn by other parties and endorsed by the said bankrupt, which said notes at the time of the filing of the said proof of claim had not yet become due, and the liability of the bankrupt thereon had not at the time of said filing been determined or fixed.

2. Because the said bank, according to the record which it made in the pass-book showing the account — said bankrupt with it, admitted that on the 21st day of March, 1903, there was on deposit with it the sum of $6,232.96, which said sum is not accounted for in said proof of claim, but, your petitioner is informed and believes

25 that the said bank has attempted to offset against the amount alleged to be due to it on account of discounted paper not matured at the date of the said bankruptcy the amount of the said deposit; and your petitioner objects to such action on the part of the bank for the reason that if permitted it would enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, said bank having reasonable cause to believe that at the time said offset is claimed to have been effected a preference would be secured, in violation of the provisions of the bankruptcy statute.

3. Your petitioner further says that since the making of the said record admitting the existence of a balance in favor of the said Phillip Semmer Glass Company, Limited, on the 21st day of March, 1903, said bank, so your petitioner is informed and believes, had attempted to offset and counterclaim amounts due upon discounted

paper upon which the name of the bankrupt appeared as indorser, and which said paper had not matured at the time of the filing of the petition in bankruptcy against the said Phillip Semmer Glass Company, Limited, and your petitioner objects that the said bank could not legally offset and counterclaim amounts of paper in its possession not yet matured against amounts of deposit then in its possession belonging to the said bankrupt or to the receiver of the said bankrupt upon his appointment.

4. Your petitioner further says that on the various dates within the period of four months prior to the filing of the said petition in bankruptcy, said bank received various amounts upon deposit from said bankrupt, which said amounts the said bank, so your petitioner is informed and believes, subsequently offset and counterclaimed against the amounts of unmatured discounted paper upon which the name of the said bankrupt appeared as indorser, and your petitioner says that the said deposits were in effect a transfer to the said bank of the property of the said bankrupt, the effect of
26 which transfer, if permitted to stand, will be to enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, the said bankrupt having given the said preference and the said bank receiving it, having had reasonable cause to believe that it was intended thereby to give a preference in violation of the provisions of the bankrupt statute.

5. And your petitioner further says that the said bank had not the right to offset and counterclaim the amounts due upon unmatured paper upon which the name of said bankrupt appeared as indorser against the amount due upon deposit to the said bankrupt at the time of the filing of the petition in bankruptcy, for the reason that the respective obligations did not constitute mutual debts and mutual credits between the estate of the bankrupt and a creditor; that at the time of the filing of the said petition the account could not be stated and one debt set-off against the other within the meaning of the bankruptcy statute.

6. And your petitioner further says that the said amounts represented by the negotiable paper not matured did not represent a provable debt against the estate of the bankrupt as required by the bankruptcy statute in cases of set-offs and counterclaims.

7. And your petitioner further says that on the 18th day of March, 1903, Peter Alexander, receiver of the above named bankrupt, served a certified copy of the order of his appointment upon the said bank, as deponent is informed, by a reading of the report of the said Receiver, and thereby became entitled to the balance of the deposit in favor of the said Phillip Semmer Glass Company, Limited, which the said bank had in its possession and which the said bank admitted three days later, to wit, the 21st day of March, 1903, amounted to the sum of $6,232.96.

27 8. And your petitioner further says that the said bank had no right to hold said deposit against the maturing of any negotiable paper upon which the name of the said bankrupt appeared which had not become due at the time of the filing of the copy of the said Receiver's appointment.

9. And your petitioner further says that the said bank having received the said preference and transfers, as heretofore alleged herein, has not surrendered such preferences and transfers as required by the bankruptcy statute as a condition precedent to the proving of said claim.

10. And your petitioner further says that in divers other respects the said proof of claim is objectionable and it should not be allowed.

That the attorneys of said creditor are Wilson & Wallis, 48 Wall street, New York.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays that the said proof of claim be reconsidered and rejected.

MARTIN CONBOY, *Petitioner.*

UNITED STATES OF AMERICA, *Southern District of New York, ss:*

I, Martin Conboy, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief.

MARTIN CONBOY.

Subscribed and sworn to before me this 12th day of September, 1903.

EDWARD T. MAGOFFIN,
Notary Public, New York Co.

The foregoing papers from the certificate of the Referee to the petition to expunge constitute and are endorsed Certificate of Referee.

Filed May 23, 1904.

28 United States District Court, Southern District of New York.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

SIRS: You will please take notice, that the issues raised by the petition for review of the order entered by the Referee herein on the 13th day of May, 1904, allowing the claim of the First National Bank of Jersey City will be brought to trial at a Stated Term of the United States District Court, appointed to be held in and for the Southern District of New York, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 23d day of May, 1904, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, May 19, 1904.

FRANK A. CLARY,
Attorney for Trustee, 27 *Pine Street, New York City.*

To Wilson & Wallis, Esqs., Attorneys for First National Bank of Jersey City, 48 Wall Street, New York City.

(Endorsed:) Notice of motion.—Referee's order, affirmed May 27, 1904.—G. C. H.—Filed May 23, 1904.

29 At a Stated Term of the District Court of the United States for the Southern Disrtict of New York, held at the Post Office Building, in the City of New York, on the 7th day of June, 1904.

Present: Hon. George C. Holt, District Judge.

In the Matter of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

On reading and filing the petition of Martin Conboy, trustee of the above named bankrupt, verified the 17th day of May, 1904, and notice of motion thereon to review the order made by the Referee herein on the 13th day of May, 1904, allowing the claim of the First National Bank of Jersey City, as reduced by said order; and on the said order and all proceedings therein referred to; and on hearing counsel for the said trustee and said creditor, it is

Ordered, that the said order be and it is hereby affirmed.

GEORGE C. HOLT, *J.*

(Endorsed:) Order of Affirmance.—Filed June 7, 1904.

30 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LTD., Bankrupt.

In Bankruptcy. No. 5757.

Petition on Appeal of Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt.

The above named Martin Conboy, Trustee in Bankruptcy, considering himself aggrieved by the judgment made and entered on the 7th day of June, 1904, in the above entitled action, confirming the order of the Referee allowing the claim herein of the First National Bank of Jersey City in the sum of $8,519.27, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

FRANK A. CLARY,
Attorney for Martin Conboy, Trustee in Bankruptcy.

The foregoing claim of appeal is allowed.

GEO. C. HOLT,
District Judge.

(Endorsed:) Petition on Appeal.—Filed June 11, 1904.

31 United States Circuit Court of Appeals for the Second Circuit.

UNITED STATES OF AMERICA, *Second Judicial Circuit, ss:*

To the First National Bank of Jersey City and Wilson & Wallis, Esqs., 48 Wall Street, N. Y. City, its attorneys, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in the State of New York, on the 8th day of July next, pursuant to a petition on appeal and assignment of errors filed in the Clerk's office of the District Court of the United States, for the Southern District of New York in the Matter of the Phillip Semmer Glass Company, Limited, bankrupt, to show cause, if any there be, why the judgment rendered in said cause confirming the finding and order of the Referee in Bankruptcy allowing the claim of the First National Bank of Jersey City as reduced by said order as in said petition of appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. George C. Holt, Judge of said District, this 9th day of June, in the year of our Lord, One Thousand Nine Hundred and Four, and of the Independence of the United States of America the One Hundred and Twenty eighth.

GEO. C. HOLT,
U. S. District Judge.

(Endorsed:) Citation on Appeal.—A copy received June 10/04. Wilson & Wallis, Att'ys for 1st Nat. Bank of Jersey City.—Filed June 11, 1904.

32 United States District Court, Southern District of New York.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

In Bankruptcy. No. 5757.

And now on the 9th day of June, 1904, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, bankrupt, by Frank A. Clary, Esq., his solicitor, and says:

That the judgment entered in said cause on the 7th day of June, 1904, confirming the order of the Referee, allowing the claim of the First National Bank of Jersey City, is erroneous and against the just rights of the said Trustee in Bankruptcy for the following reasons:

First. Because the evidence shows that at the time of the filing of the petition in bankruptcy said bankrupt had on deposit in said bank the sum of $6,232.96. That at said time of the filing of the petition

in bankruptcy the bank held certain promissory notes in an amount greater than such deposit which notes were made to the order of the bankrupt and had been theretofore endorsed by the bankrupt to the bank, and upon which notes the bankrupt was then liable to the bank as endorser.

That the Receiver of the bankrupt demanded such deposit from the bank immediately after the filing of said petition in bankruptcy but the bank refused to surrender or pay the same and forth-
33 with, and before the maturity of any of said notes, applied the said deposit upon and against the bankrupt's said liability to the bank as endorser on certain of said notes.

The Court erred in holding and adjudging that the said bank had the right to make such set-off under Section 68*a* of the Bankruptcy Act.

Second. Because the evidence shows the facts recited in the first assignment of error herein and the Court erred in holding and adjudging that the application of the amount of such deposit as aforesaid to the payment of the bankrupt's liability as endorser of certain of the promissory notes, so as aforesaid in possession of said bank, and not matured at the date of the filing of the petition in bankruptcy, was not an undue and unlawful preference within the meaning of the Bankruptcy Act and in allowing the bank to prove any claim against the estate of said bankrupt before the re-payment to the said estate of the amount so applied on the said promissory notes.

Wherefore, the said Martin Conboy Trustee in Bankruptcy of said Phillip Semmer Glass Company, Limited, bankrupt, prays that said judgment affirming the action and ruling of the Referee allowing the claim of said the First National Bank of Jersey City in the sum of $8,519.27, be reversed and that the said Court may be directed to enter a judgment and order reversing the action, ruling and order of the Referee.

FRANK A. CLARY,
Solicitor for Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company.

(Endorsed:) Assignment of Errors.—Filed June 9, 1904.

34 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Thomas Alexander, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this eighth day of July, in the year of our Lord one thousand nine hundred and four, and of the Independence of the said United States the one hundred and twenty-ninth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

35 United States Circuit Court of Appeals for the Second Circuit.

No. 113. October Term, 1904.

Argued December 23, 1904; Decided January 12, 1905.

In the Matter of THE PHILLIP SEMMER GLASS COMPANY, LTD., Bankrupt.
MARTIN CONBOY, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

Before Judges Lacombe, Townsend, and Coxe.

This cause comes here on appeal from an order of the District Court, Southern District of New York, confirming a report of Referee in Bankruptcy which allowed the claim of the First National Bank of Jersey City for $8,519.27 against the bankrupt's estate.

Per Curiam.—It seems unnecessary to add anything to the discussion of the case which will be found in the report of the Referee (11 *Am. Bank Rep.* 665). It was held in *N. Y. County National Bank v. Massey* (129 *U. S.* 138) that, in the absence of fraud or collusion, a bank which holds promissory notes of a bankrupt need not surrender a deposit balance standing to the credit of the bankrupt on the day of the adjudication in bankruptcy, but may set it off against said notes and prove for the amount remaining due after such set-off. The appellant seeks to differentiate the case at bar on the ground that the notes held by the First National Bank were not due, at the date of adjudication (they have since matured) and
36 that the bankrupt was not the maker but the endorser—wherefore the notes did not constitute a "debt" of the bankrupt. His argument is interesting and ingenious but entirely disregards Section 1, Subdivision 11, of the Bankruptcy Act, which provides that the word "debt" when used in said act "shall include any debt, demand, or claim provable in bankruptcy." That meaning must be given to the word when used in the set-off section (68): "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid." To determine therefore whether the holder of a claim is entitled to the benefit of Section 68 it is necessary only to enquire whether his claim is one provable in bankruptcy.

We concur with the Court of Appeals for the Third Circuit (*Moch v. Market St. Nat. Bank,* 107 *F. R.* 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy.

The order appealed from is affirmed with costs.

Martin Conboy, for the Appellant.

Hamilton Wallis, for the Appellee.

37 At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 23rd day of January one thousand nine hundred and five.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of the PHILIP SEMMER GLASS COMPANY, LTD., Bankrupt.
MARTIN CONBOY, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. K. T.
E. H. L.
A. C. C.

38 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. *In re* Semmer Glass Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 23, 1905. William Parkin, Clerk.

39 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.
MARTIN CONBOY, Trustee in Bankruptcy, Appellant,
against
THE FIRST NATIONAL BANK OF JERSEY CITY, Appellee.

Petition for Rehearing.

To the Hon. the Judges of the Circuit Court of Appeals for the Second Circuit:

Your petitioner, Martin Conboy, trustee in bankruptcy of the above named bankrupt, respectfully presents this his petition for a rehearing in the above entitled cause.

40 January 12, 1905, this Court handed down its decision in said cause allowing to the First National Bank of Jersey City the right of set-off claimed and asserted by said bank on filing its

proof of claim against the bankrupt's estate. Judgment was entered by the Clerk on said decision, January 23d, and the mandate thereon was issued on January 24th.

On February 20, 1905, the Supreme Court of the United States handed down its decision of the case of Western Tie and Timber Company against Brown. This decision appeared in the Banks Law Publishing Company advance sheets issued about March 15th, and in the West Publishing Company and Lawyers' Co-operative Company advance sheets issued early in April.

The ground of the Court's decision in the case at bar is that the right to set-off in bankruptcy was by Subdivision 11 of Section 1 of the present act enlarged and extended so that any two counter debts or claims, it is held, may now be set-off in bankruptcy if each of them could be proved in bankruptcy against the debtors respectively.

Having carefully examined the opinion of the Court, I think that with propriety I may ask the Court to consider whether this action be not one in which it will be proper to grant a rehearing to the appellant on the ground that the Supreme Court of the United States has, in the decision of the case of the Western Tie and Timber Company against Brown, indicated almost to a certainty that it considers the right to set-off under the present act to be precisely the same as it was under the Act of 1867; that it does not consider the right to set-off in bankruptcy to have been enlarged or extended by the definition of the word debt contained in Subdivision 11 of Section 1 of the present act.

The claim of the Western Tie and Timber Company against the estate of Harrison, the bankrupt in that case, was an ordinary debt for advances of money, and the claim of Harrison, the bank-
41 rupt, against the Western Tie and Timber Company was for money collected by said company as agent for Harrison. Each of these claims was a claim provable in bankruptcy. If the Western Tie and Timber Company had been the bankrupt, Harrison could certainly have proved his claim in bankruptcy against the estate of the Company.

But the Supreme Court held that the Western Tie and Timber Company had no right to a set-off of these claims because they were not "mutual debts or mutual credits," citing and reaffirming their decision under the Act of 1867 in Libby *v.* Hopkins, 104 U. S., 303.

I respectfully urge the Court to consider whether this decision is not really equivalent to a decision that the right to set-off has not been by the present Act extended to all cases where both debts are such as would be provable in bankruptcy against the estates of the debtors respectively; whether this decision is not really equivalent to a decision that the right of set-off in a court of bankruptcy under the present Act, is the same as it was under the Act of 1867, viz.: "The legal and equitable set-off of courts of law and equity, and nothing more."

That was the expression of the Supreme Court in its decision of the case of Sawyer *v.* Hoag, 84 U. S., 610. Similar language was also used in the decision of the case of Drake *v.* Rollo, 85 U. S., 629.

The decision in the case of Libby *v.* Hopkins, *supra,* is directly in line with these two decisions and manifestly, as it seems to me, these three Supreme Court decisions are but three different expressions of one and the same conclusion or principle, viz.: That the set-off jurisdiction of a court of bankruptcy is NOT greater or broader than the set-off jurisdiction of a court of equity.

If so, in accordance with the practice pointed out in the decision of Western Tie & Timber Company *v.* Brown, the First National Bank of Jersey City, in this case, should be compelled by the Court to file its claim for $15,000, instead of $8,500, and pay over
42 to the trustee the amount of the bankrupt's deposit retained by it.

I had relied upon the decisions of the Supreme Court under the Act of 1867, and upon the substantial justice and facts of the situation, in arriving at my conclusions as to the law of this case. But, as a matter of mere technical etymology even, it has seemed to me that the definition of the word "debt" in Subdivision 11 of Section 1 of the Act could have no application to the phrase "mutual debts or mutual credits" in Section 68. The inherent and necessary connotation of the word "mutual" is dual or plural; a "*mutual debt*" would be unthinkable and meaningless. The definition of the word "debt" is therefore useless in the interpretation of the phrase "mutual debts or mutual credits," and I cannot believe it was intended by the framers of the act to be used for that purpose. I urge the Court to observe again the title to Section 1 of the act printed in black face type. The section is a definition not merely of "words" but of "words and phrases." There are, in the section definitions of many phrases. If it had been intended to define the phrase "mutual debts or mutual credits," I believe the definition of that phrase would also have been inserted. Thus, although Section 1, Subdivision 9, provides a definition for the word "creditor," the framers of the act deemed it also necessary to define in Subdivision 23 the phrase "*secured cred-tor.*"

As a further ground for granting the appellant a rehearing in this case, I desire to call the Court's attention to the fact that even now it is very doubtful and uncertain, in view of the comparatively few times that the Supreme Court has passed upon such questions arising in bankruptcy cases, whether the trustee's right to review the judgment of this Court in the Supreme Court is by writ of *certiorari* or by appeal. It is probably *certiorari,* but even with the Supreme Court's unusual liberality in granting this writ
43 to review decisions in bankruptcy cases, of course if the judgment is appealable the writ would fail. So that in order to make sure of a review of the judgment by the Supreme Court it will be necessary for the trustee to go up both on *certiorari* and on appeal. This will necessitate the preparation of two records and the entire expense of review in two cases.

Wherefore, upon the foregoing grounds, your appellant and petitioner respectfully prays the Court to grant to him a rehearing of said cause.

FRANK A. CLARY,
Attorney for and of Counsel with Martin Conboy, the Petitioner, 27 Pine St., New York.

I, Frank A. Clary, of counsel for the appellant herein, do hereby certify that, in my judgment, the foregoing petition for a rehearing is well founded and that the same is not interposed for delay.

FRANK A. CLARY.

Dated, New York, May 5, 1905.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Filed May 8, 1905. William Parkin, Clerk. Matter of Philip Semmer Glass Co. Motion for reargument denied. May 17, 1905.

44 At a Stated Term of the Circuit Court of Appeals of the United States held in and for the Second Circuit at the Post-Office Building in the City of New York, Southern District of New York on the 24th day of May, 1905.

Present: Hon. E. Henry Lacombe, Hon. William K. Townsend, Hon. Alfred C. Coxe, Circuit Judges.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
against
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

The Court having rendered its decision on this appeal at said term, January 12th, 1905, and judgment thereon having been entered by the Clerk at said term, January 23rd, 1905, and the said Martin Conboy, Trustee, appellant, having presented a petition for a re-hearing at said term, and the said petition having been filed by the Clerk on the 8th day of May, 1905, and the Court having duly considered the said petition and having rendered its decision denying the said petition for a re-hearing at said term on the 17th day of May, 1905, it is

Ordered that the said petition for a re-hearing on this appeal be and the same is hereby denied.

E. H. L.
W. K. T.

45 Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conbot, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Order and notice of settlement. Frank A. Clary Attorney for Appellant, 27 Pine Street, New York. Copy received, May 22, 1905, Wilson & Wallis, Attys. for claimant United States Circuit Court of Appeals, Second Circuit. Filed May 24, 1905. William Parkin, Clerk.

46 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
against
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

Assignment of Errors.

And now, on the 27th day of May, 1905, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt, by Frank A. Clary, Esq., his solicitor and counsel, and says:

That the judgment rendered in said cause on the 23rd day of January, 1905, affirming the order of the United States District Court, allowing the claim of the First National Bank of Jersey City, and the order entered in said cause on the 25th day of April, 1905, denying the motion of the said trustees to have the said Circuit Court of Appeals for the Second Circuit recall its mandate and vacate the order thereon, and the order entered the 24th day of May, 1905, denying the petition for re-hearing, are erroneous and against the just rights of the trustee in bankruptcy for the following reasons:

First. For that the said Circuit Court of Appeals finds that the unmatured notes held by the First National Bank of Jersey City against the bankrupt and the claim of the bankrupt against
47 the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the same should be set off one against the other; and for the further reason that the said Court finds that the allowance of said set off was not an unlawful preference within the true intent and meaning of the Bankrupt Law.

And the said appellant prays that the orders aforesaid may be reversed, annulled and altogether held for naught and that he may be restored to all things which he has lost by reason of said orders.

FRANK A. CLARY,
Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York.

Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Assignment of Errors. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed May 27, 1905, William Parkin, Clerk.

48 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
against
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

Petition for Appeal.

To the honorable the Supreme Court of the United States:

The appeal of Martin Conboy, the Trustee of the Phillip Semmer Glass Company, Limited, Bankrupt, respectfully shows:

That upon the 18th day of March, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, and pursuant to said petition an order of adjudication was duly entered therein on the 4th day of April, 1903, the proceeding being in the United States District Court for the Southern District of New York.

For some time prior to the date of the filing of the petition, the bankrupt had an account with the First National Bank of Jersey City, the claimant above named. On that date there was a balance due to the bankrupt from the claimant on this account of $6,232.96. On the same day, the bank held unmatured promissory notes made by various makers in favor of the bankrupt and, in the ordinary course of business, discounted for the bankrupt's account. The amount of these notes, so discounted, was $15,293.90. On the
49 12th day of June, 1903, a proof of debt was filed by the said claimant in the bankruptcy proceeding, in which the claimant alleged that the bankrupt was, at and before the filing of the petition in bankruptcy, indebted to the bank in the sum of $9,080.03, this amount being the aggregate of various notes of other parties endorsed by the bankrupt and discounted by the bank. The account between the bankrupt and the bank was the ordinary and usual deposit account kept between banker and depositor.

The Trustee objected to the proof of claim and petitioned that it be disallowed for the reason that the bank had utilized the amount on deposit with it on the filing of the petition in bankruptcy in payment of other notes than those proved on, similarly made, endorsed and discounted which had not matured at the time of the filing of the petition.

After testimony was taken establishing the above facts, the referee held that the claimant was permitted by the provisions of §68 of the Bankrupt Act to set off against the unmatured obligations of the bankrupt, the amount on deposit to the credit of the bankrupt and denied the trustee's petition. The said referee held that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the said bankrupt, and that the same should be set off one

against the other, and that the said First National Bank of Jersey City had properly filed its proof of claim for the balance only, and that the same was properly allowed and dividends should be paid thereon.

Thereafter the said trustee, feeling aggrieved by the action of the referee, sought a review of the decision of said referee by petition for that purpose and the matter coming on to be heard before the District Court of the United States in the Southern District of New York, the ruling of said referee was affirmed; and the trustee,
50 still feeling himself aggrieved, appealed from the said order of the District Court to the Circuit Court of Appeals for the Second Circuit, and, the said appeal duly coming on to be heard, the said Circuit Court of Appeals affirmed the said order of the District Court, holding that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the bankrupt and, on the 23rd day of January, 1905, an order was duly entered and filed by the said Circuit Court of Appeals affirming the order of the District Court and the ruling of the said referee as aforesaid.

That in view of the fact that no findings of fact and conclusions of law were filed by the said Circuit Court of Appeals prior to or at the time of the re-dition of said judgment, the trustee, on or about the 25th day of April, 1905, petitioned the said Circuit Court of Appeals for the Second Circuit to recall its mandate and vacate the order for the same on the ground that the judgment rendered was irregular; That said petition came on to be heard on the said 25th day of April, 1905 and, after due consideration thereof, said motion was denied.

Thereafter and on the 8th day of May, 1905, said trustee presented a petition for re-hearing in due form to the said Circuit Court of Appeals for the Second Circuit, relying upon the decision of the Supreme Court of the United States in the case of Western Tie & Timber Co. *v.* Brown, 196 U. S. 502. That said petition was duly considered by the said Circuit Court of Appeals for the Second Circuit and, on the 24th day of May, 1905, an order on their decision so rendered on the 17th day of May, 1905, was entered denying the same.

That as the appellant, Martin Conboy, Trustee, is informed and believes, in the proceedings above recited, errors have been
51 committed by the learned Circuit Court of Appeals in holding that the First National Bank of Jersey City had properly filed its proof of claim, and that the same was properly allowed and dividends should be paid thereon, by reason of all of which your petitioner has sustained grievous loss.

Wherefore this Appellant appeals from the whole of the said order of affirmance of the Circuit Court of Appeals for the Second Circuit, dated the 23rd day of January, 1905, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 25th day of April, 1905, denying the motion of your petitioner to recall the mandate of said Court and cancel the order for same, and from the whole of the said order of the Circuit Court

of Appeals for the Second Circuit, dated the 24th day of May, 1905, denying the petition of the said trustee for a re-hearing; and respectfully prays that the said orders and decrees and the pleadings may be sent to the Supreme Court of the United States without delay and that the said Supreme Court will proceed to hear the said cause, and that the said orders and decrees of the Circuit Court of Appeals for the Second Circuit and every part thereof may be reversed and a decree made directing that the claim of the said First National Bank of Jersey City, as filed, be disallowed, and that your petitioner may — such other and further relief in the premises as may be just.

Dated, May 24th, 1905.

FRANK A. CLARY,
Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 *Pine Street, New York.*

Allowed May 27, 1905.
R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

52 Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Petition for Appeal. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1905. William Parkin, Clerk.

53 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
against
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

Certificate of Justice of the Supreme Court of the United States.

In this cause, I hereby certify that, in my opinion, the determination of the question or questions involved in the allowance or rejection of the claim of the First National Bank of Jersey City is essential to a uniform construction of the Bankrupt Law throughout the United States.

This certificate is made conformably to Act of Congress of July 1, 1898, § 25-*b*, paragraph 2.

Dated this 27 day of May, A. D. 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S., Washington,

Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1905. William Parkin, Clerk.

54 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
against
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

Findings of Fact and Conclusions of Law.

This case coming here on appeal from an order of the District Court of the United States for the Southern District of New York, which affirmed an order of the Referee allowing a claim of the First National Bank of Jersey City against the contention of the Trustee in Bankruptcy that said claim embraced the allowance of a set off which did not exist under the bankrupt law, and that the said creditor had received a preference from the bankrupt and should not be allowed to prove its claim unless and until it first surrendered the amount sought to be set off, constituting the alleged preference, and the court having affirmed the order appealed from and the said trustee, Martin Conboy, having procured the allowance of an appeal from said judgment with a certificate under Section 25-*b*, Paragraph 2 of the Bankrupt Act by a Justice of the Supreme Court,

Now, therefore, we make the following findings of fact and conclusions of law to be included in the record on said appeal
55 *nunc pro tunc* as though the same were made and filed at the time of the entry of the judgment of this Court on the 23rd day of January, 1905.

Findings of Fact.

I. On March 18th, 1903, a petition to procure an adjudication that the Phillip Semmer Glass Company, Limited, was a bankrupt was filed in the District Court of the United States for the Southern District of New York and the said Phillip Semmer Glass Company, Limited, was thereafter adjudicated a bankrupt.

II. On March 18th, 1903, a receiver was appointed of the alleged bankrupt and on the same day served a certified copy of the order of his appointment on the First National Bank of Jersey City.

III. For some time prior to March 18th, 1903, the bankrupt had had a deposit account in the claimant bank, and on said March 18th,

1903, there was a balance due the bankrupt from the bank on this account of $6,232.96. On the same day the bank held unmatured promissory notes made by various makers in favor of the bankrupt which it had, upon endorsement by the bankrupt and in the ordinary course of business, discounted for the bankrupt's account and on which the bankrupt had received from the bank a sum largely in excess of the balance above mentioned. This balance the bank applied to the payment of these notes as far as it would go and then filed its claim for the remainder of the notes, amounting in all including interest and protest fees to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy. Payment thereof respectively was duly demanded and refused and notice of protest given to the bankrupt as endorser. The following is a list of the notes charged against the deposit:

56 Maker.	Date.	Time.	Due.	Amount.	Protest fees.
Potts & Partridge....	Dec. 8/02	4 m.	Apr. 8/03	818.63	1.30
"	Dec. 20/02	"	Apr. 20/03	796.70	1.30
G. E. Orcutt.	Jan. 6/03	"	May 6/03	553.68	1.50
"	Nov. 22/02	"	M'ch 22/03	714.00	1.50
K. C. Brown..... ...	Nov. 22/02	"	"	799.83	1.50
"	Dec. 5/02	"	Apr. 5/03	739.89	1.50
Z. K. Berlin.....	"	"	"	503.85	1.50
G. M. Taylor.....	Dec. 11/02	"	Apr. 11/03	498.95	1.50
W. C. Hunter.....	Dec. 24/02	"	Apr. 24/03	300.00	1.50
H. C. Browning.....	Dec. 15/02	"	Apr. 15/03	488.25	1.50
				6,213.78	14.60

The following is a list of the notes for which a claim is filed,—

Maker.	Date.	Time.	Due.	Amount.	Protest fees.
	1903.		1903.		
H. C. Browning.....	Jan. 3	4 mo.	May 3	601.17	1.50
G. G. Wacker.	Jan. 10	3 "	Apr. 10	269.30	1.30
H. C. Browning.....	Jan. 9	4 "	May 9	601.17	1.50
F. C. Lamonte.....	Jan. 12	3 "	Apr. 12	200.00	1.25
W. Stabler.....	Jan. 12	" "	Apr. 12	349.00	1.50
Potts & Partridge.....	Jan. 21	4 "	May 21	483.10	1.50
H. C. Browning.....	Feb. 5	" "	June 5	384.74	1.50
Z. K. Berlin.....	Jan. 24	" "	May 24	493.65	1.50
K. C. Brown.....	Feb. 6	" "	June 6	597.37	1.50
W. C. Hunter	Feb. 9	" "	June 9	425.00	1.50
Z. K. Berlin.....	Feb. 13	" "	June 13	498.93	
G. E. Orcutt	Feb. 17	" "	June 17	350.00	
K. C. Brown.	Feb. 16	" "	June 16	651.39	
Z. K. Berlin.....	Feb. 20	3 "	May 20	323.60	1.50
W. C. Hunter.....	Feb. 20	4 "	June 20	425.00	
Peter Wagner.....	Feb. 18	" "	June 18	489.20	
W. Stabler	Feb. 27	3 "	May 27	735.88	1.50
P. Wagner.....	M'ch 6	4 "	July 6	283.28	
Potts & Partridge.....	M'ch 4	" "	July 4	468.34	
Geo. H. Payne.....	M'ch 9	" "	June 9	450.00	.54
				$9,080.12	$19.09

The account between the bankrupt and the bank was the ordinary and usual deposit account between banker and depositor.

IV. The trustee moved to expunge the claim of the bank on the ground that it was not within the right of the bank to off set the deposit in its hands against the obligations of the bankrupt on the endorsements and should it be permitted to do so the result would be an unlawful transfer and a preference of the bank to the extent of the deposit over the bankrupt's other creditors of the same class.

57 The referee denied that motion and an appropriate order was made and entered. The trustee, thereupon, duly filed his petition to have the ruling reviewed by the District Judge. The District Judge on the 7th day of June, 1904, made an order affirming the order of the referee. From that order an appeal was taken to the Circuit Court of Appeals for the Second Circuit and the Circuit Court of Appeals, on the 23rd day of January, 1905, entered an order affirming the order of the District Court and the ruling of the referee. On the 8th day of May, 1905, the trustee presented a petition for rehearing to the said Circuit Court of Appeals for the Second Circuit and the same, having been considered by the said Circuit Court of Appeals at the term at which said judgment had been rendered, was, on *on* the 24th day of May, 1905, denied. The trustee having expressed the wish to obtain a review of the decision of this court, in the Supreme Court, these findings of fact and conclusions of law in conformity with General Order 36 were made and ordered filed *nunc pro tunc* as of the date of filing of opinion sustaining the District Court.

Conclusions of Law.

I. That the claim of the First National Bank of Jersey City on account of the unmatured notes endorsed by the bankrupt and held by said bank and the claim of the bankrupt against the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the said bank was entitled to set off one against the other.

II. That the allowance of said set off is not an unlawful preference within the true intent and meaning of the Bankrupt Law.

E. H. LACOMBE,
U. S. Circuit Judge.
WM. K. TOWNSEND,
U. S. Circuit Judge.
ALFRED C. COXE,
U. S. Circuit Judge.

Endorsed: United States Circuit Court of Appeals, Second Circuit. In the Matter of Philip Semmer Glass Company, Limited, Bankrupt.—Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Findings of Fact and Conclusions of Law.—Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street New York.—United States Circuit Court of Appeals, Second Circuit. Filed June 14, 1905. William Parkin, Clerk.

58 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from — to — inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, as the same remain of record and on file in my office, made up pursuant to General Order in Bankruptcy No. 36, Section 3.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 14th day of June in the year of our Lord One Thousand Nine Hundred and Five and of the Independence of the said United States the One Hundred and twenty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

59 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
against
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

Affidavit.

STATE OF NEW YORK, *County of New York, ss:*

Frank A. Clary being first duly sworn, says:

That he is the attorney and solicitor for Martin Conboy, trustee, the appellant herein; that on the 1st day of June 1905 at the office of Wilson & Wallis, attorneys and solicitors for the First National Bank of Jersey City, appellee herein, at No. 48 Wall Street, Borough of Manhattan, New York City, he delivered a copy of the annexed citation on appeal to the Supreme Court of the United States, to William G. Wilson, one of said attorneys and solicitors for said appellee.

FRANK A. CLARY.

Sworn to before me this 7th day of June 1905.

[Seal of Edward T. Magoppin, Notary Public, New York County.]

EDWARD T. MAGOPPIN,
Notary Public, New York Co.

60 In the Circuit Court of Appeals of the United States for the Second Circuit.

In the Matter of PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,
against
FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

To the First National Bank of Jersey City and Wilson & Wallis, its attorneys, 48 Wall Street, New York City:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the 26 day of June 1905, pursuant to a petition of appeal filed in the Office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, wherein Martin Conboy, Trustee, is Appellant and you are Appellee, to show cause, if any there be, why the orders and decrees of the said Circuit Court of Appeals for the Second Circuit herein and mentioned in the said petition should not be corrected and speedy justice done to the parties in that behalf.

Dated, May 27 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

61 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In the Matter of Phillip Semmer Glass Company, Limited, Bankrupt. Martin Conboy, Trustee, Appellant, against First National Bank of Jersey City, Claimant-Appellee. Citation. Frank A. Clary, Solicitor and Counsel for Appellant, Martin Conboy, Trustee, 27 Pine Street, New York. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 14, 1905. William Parkin, Clerk.

Endorsed on cover: File No. 19,811. U. S. circuit court appeals, 2d circuit. Term No. 309. Martin Conboy, as trustee in bankruptcy of The Phillip Semmer Glass Company, Limited, bankrupt, appellant, *vs.* First National Bank of Jersey City. Filed June 22d, 1905. File No. 19,811.

FILE COPY.

OCT 23 1905

JAMES H. McKENNEY,
Cl

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]54

IN THE MATTER

of

PHILLIP SEMMER GLASS COMPANY, LIMITED,
Bankrupt.

MARTIN CONBOY, TRUSTEE,
Appellant,

against

FIRST NATIONAL BANK OF JERSEY CITY,
Claimant-Appellee.

BRIEF FOR APPELLANT ON MOTION.

MARTIN CONBOY,
Of Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	October Term, 1905. No. 309.
MARTIN CONBOY, Trustee, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.	

Brief for Appellant on Motion to Dismiss or Affirm.

THE HISTORY OF THIS LITIGATION.

On March 18th, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, and an order of adjudication sub-

sequently entered. For some time prior to the filing of the petition the bankrupt had an account of the ordinary and usual deposit character with the First National Bank of Jersey City. At the time of the filing of the petition the balance due to the bankrupt on this account amounted to $6,232.96. At the same time the bank held unmatured promissory notes, made by various makers in favor of the bankrupt, on which the bankrupt was endorser, amounting to $15,293.90.

The bank applied the money in its hands *pro tanto* to the payment of the notes endorsed by the bankrupt and filed a claim for the balance.

The trustee objected to the proof of claim and petitioned that it be disallowed on the ground that it was not permissible under the Bankrupt Act for the bank to apply as a set-off the amount on deposit. After proofs taken and hearing had, the referee, on May 13, 1904, rendered a lengthy opinion in favor of the bank, and then made an order allowing the claim and affirming the right of set-off.

The trustee immediately petitioned for a review of the decision of the referee, and on June 7, 1904, after a hearing on this petition, the ruling was affirmed by the District Court.

The trustee thereupon, within the time limited by law, appealed from the order of the District Court to the Circuit Court of Appeals for the Second Circuit, and, after argument, the Circuit Court of Appeals rendered a decision affirming the previous orders entered in the case.

Subsequent to the entry of the order in the Circuit Court of Appeals, the decision of this Court in the case of Western Tie & Timber Company *v.* Brown, 196 U. S., 502, appeared in the United States Reports, and as the opinion of this Court expressed in that decision was at variance with the

opinion of the Circuit Court of Appeals in this case, as counsel for the appellant believed, it was determined to take an appeal.

The same term of the Circuit Court of Appeals, continuing, a motion was made to recall the mandate and vacate the order for the same on the ground that the judgment rendered was irregular for the reason that no findings of fact and conclusions of law had been filed as required by General Order No. 36. The petition came on to be heard, and, after due consideration, the motion was denied.

Thereupon, and at the same term, the trustee, relying upon the decision of this Court in the case of Timber Company *v.* Brown, *supra*, presented a petition for rehearing in due form to the Circuit Court of Appeals, and this petition having been duly considered by that Court at the same term at which the original order was made, was on the 17th of May, 1905, denied, and upon this decision an order was entered on the 24th of May, 1905.

Within three days from the entry of this order, namely, on the 27th day of May, 1905, a petition for appeal to this Court from the judgment of the Circuit Court of Appeals, entered the 23d day of January, 1905, was presented to Mr. Justice Peckham and was allowed on the same day. A certificate was signed by Mr. Justice Peckham to the effect that, in his opinion, a determination by this Court of the questions involved in connection with the claim of the bank was essential to a uniform construction of the Bankrupt Law throughout the United States. Assignment of errors was filed at the same time and an appeal conformably to Section 25-*b*, paragraph 2, of the Bankrupt Law, thereby perfected, which is now pending in this Court.

POINT I.

The motion to dismiss should be denied, as this Court has jurisdiction to entertain this appeal.

The appeal was properly taken. The case was not finally disposed of by the Circuit Court of Appeals until the adjournment of the term at which the judgment was rendered. All judgments and decrees are under the control of the court during that period and may be opened or reviewed.

The petition for re-hearing was addressed to the discretion of the Court. The Court duly considered it. By this the effect of the final decree was suspended. Substantially the decree was not final until the 24th day of May, 1905, within thirty days from which date the appeal was perfected.

Brockett *et al. v.* Brockett, 2 How., 238.

In most of the Federal Circuits, the time within which a petition for rehearing must be presented has been limited by local rules; thus, in the first circuit, a petition must be presented within one month; in the fifth, twenty days; sixth, thirty days; seventh, thirty days; and in the ninth, fifteen days after opinion or judgment.

The only provision governing petitions for rehearing in the second circuit is that contained in original Rule 29 of the Circuit Court of Appeals limiting the time for the presentation of such petition to the term at which the judgment is entered.

In accordance with the rule of the second circuit, the petition in question, as shown by the order denying the application for re-hearing, was presented at the term at which the judgment was en-

tered and, therefore, under the decisions of this Court, operated as a suspension of the judgment until a determination thereon had been had by the Circuit Court of Appeals.

The time to appeal from the final decree did not begin to run until the petition for rehearing had been decided.

> Aspen Mining & Smelting Company *v.* Billings, 150 U. S., 31.
> Voorhees *v.* Noye Manufacturing Company, 151 U. S., 35.

Counsel for appellant, in connection with the limitation of time fixed by the General Orders, contends that the short period of thirty days within which an appeal must be taken is intended to prevent the tying up of bankrupt estates by prolonged litigations over disputed claims. A similar contention was formerly made with regard to the shorter period of ten days within which, under the former provisions of the Judiciary Act, an appeal should be perfected in order that it might operate as a *supersedeas*. This Court has uniformly held that the ten days fixed by the former provisions and the thirty days now fixed by the provisions of the Judiciary Act do not begin to run until the decision of a petition for a rehearing or a motion to set aside the decree has been disposed of by the Court.

The Slaughter-house Cases, 10 Wall., 273, were on writs of error to the Supreme Court of the State of Louisiana.

> "Petitions for re-hearing were filed by the losing parties on the 26th of April, 1870, and on the 9th of May following an entry was made in each case that the petition for re-hearing was refused. Writs of error to the state court were subsequently prayed by the same parties, and on the 13th of May last,

the writs of error were allowed by the Associate Justice of this court allotted to that Circuit, and they were duly filed on the 16th day of the same month as appears by the record.

"Filed as the writs of error were, within ten days from the date of the entry refusing the petition for re-hearing, it is claimed by the plaintiffs that the several writs of error operate as a *supersedeas* and stay execution under the twenty-third section of the Judiciary Act. Doubts were at one time entertained upon that subject, but since the decision in the case of Brocket *v.* Brocket (2 How., 238) the question must be considered as settled in accordance with the views of the plaintiffs."

Mr. Justice Clifford in Slaughter-house Cases, 10 Wall., 289.

See also in this connection

Railroad Company *v.* Bradleys, 7 Wall., 575, and

Memphis *v.* Brown, 94 U. S., 715.

In the latter case a judgment granting a peremptory mandamus was entered on March 2, 1876. Afterwards, during the same term, May 20th, the City appeared and moved the Court to set aside the order of March 2d; but this motion was refused and that order re-entered as the final judgment of the Court in the premises. A writ of error was sued out upon this last judgment and a *supersedeas* perfected by giving the required bond within sixty days thereafter.

This Court, by Chief Justice Waite, ruled that

"* * * the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of."

Memphis *v.* Brown, 94 U. S., 715, 716, 717.

Texas & Pacific Railway Co. *v.* Murphy (111 U. S., 488) was on a motion to dismiss the writ of error united to a motion to affirm. The facts as shown in the opinion of Chief Justice Waite were as follows:

"On the 29th of May, 1883, a judgment was entered by the Supreme Court of Texas affirming a judgment of the District Court of Harrison County. The following entry appears in the record under date of December 21st, 1883:

"'Appeal from Harrison.

"'THE TEXAS PACIFIC RAILROAD COMPANY v. JAMES MURPHY.	No. 422. Case 1111.

"'Opinion of the court delivered by Mr. Justice Slayton. Mr. Chief Justice Willie not sitting in this cause.

"Motion of the appellant for a rehearing in this cause came on to be heard, and the same having been considered by the court, it is ordered that the motion be overruled and the rehearing refused; that the appellant, the Texas Pacific Railway Company, pay all the costs of this motion.

* * * * * * *

"It is expressly ruled in Brocket *v.* Brocket, which has been followed in many cases since, that if a petition for rehearing is presented in season and entertained by the court, the time limited for an appeal or writ of error does not begin until the petition is disposed of. Slaughter House Cases, 10 Wall., 273, 289; Memphis *v.* Brown, 94 U. S., 715, 717. The motion for rehearing in this case was not decided until December 21st,

and the writ of error was sued out and served within sixty days thereafter. This was in time to secure the supersedeas."

Texas & Pacific Railway Co. *v.* Murphy, 111 U. S., 488, 489, 490.

Of course, if the petition for a rehearing is not presented by a party who is entitled to present it, as in Sage *et al. v.* Central Railroad Company *et al.*, 93 U. S., 412, 418, 419; or if it is not presented at the proper term, as in Cambuston *v.* United States, 95 U. S., 285, 287, so that the Court cannot entertain it, then the Court's disposition of it does not affect the original judgment. But the disposition of such a motion or petition when it is presented by a party entitled to do so within the proper time is in effect a re-entry of the original judgment appealed from.

The principle for which we are contending is nowhere expressed more simply or clearly than by Chief Justice Fuller as follows:

"* * * if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Aspen Mining & Smelting Co. *v.* Billings, 150 U. S., 31; Voorhees *v.* Noye Manufacturing Co., 151 U. S., 135; Brocket *v.* Brocket, 2 How., 238 249; Texas & Pacific Railway *v.* Murphy, 111 U. S., 488; Memphis *v.* Brown, 94 U. S., 715; Northern Pacific Railroad *v.* Holmes, 155 U. S., 137."

Kingman *v.* Western Manufacturing Co., 170 U. S., 675, 678.

POINT II.

The question raised by this appeal has never been passed upon by this Court, and cannot, therefore, be disposed of on motion to affirm.

The question arising on the merits is not of a character to be disposed of on a motion to affirm.

Opposing counsel himself does not assert that this Court has ever determined the proper rule of setoff applicable to the facts involved in the case at bar. He cites the recent decision in the New York Court of Appeals with opinion by Chief Judge Cullen in *Frank* v. *Mercantile National Bank*, 182 N. Y., 264, to show that there is a uniformity of decision in construing the provisions of the Bankrupt Law on the question involved in this appeal.

We have attached as an *addendum* to this brief the full report from the advance sheets, exclusive of the argument of counsel, of that case, as Volume 182 has not yet been published and distributed.

In his opinion, Chief Judge Cullen states expressly that

> *"If the defendant's rights depended on the equitable rule of setoff as it obtains in this State, it is clear that the notes held by it which had not matured at the time of the transfer of the title from the bankrupt to his assignee could not be setoff against the plaintiff's claim. Fera* v. *Wickham (135 N. Y., 223) is a conclusive authority to that effect, and so the respondent's counsel concedes."*

The learned Court of Appeals, speaking by its Chief Judge, holds, however, that a different principle of setoff is required to be applied by the terms of the Bankrupt Law, and cites a number of de-

visions in the District and Circuit Courts as authority for this interpretation of the statute.

We have had occasion in the Circuit Court of Appeals to discuss these decisions with the result that the Circuit Court of Appeals based its opinion upon the definition of the word "debt," contained in Section 1, Subdivision (11) of the Act, which it read into Section 68 providing for setoff. One of the Judges upon the oral argument stated that the former decisions of this Court were based upon the law of '67, which provided no definition for the term "debt," and so made applicable the ordinary legal and equitable principles of setoff.

The Court of Appeals of New York has gone farther, however, in this connection, and in the course of his opinion Chief Judge Cullen observes:

> "Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammon* v. *Kimball*, 92 U. S., 362, which arose under the Bankrupt Law of 1867, the provisions of which so far as they deal with the questions involved in this case are substantially the same as the present law."

Scammon v. *Kimball* was an action by a policyholder against the assignee in bankruptcy of a fire insurance company and the complainant therein was allowed to set off the sum owing him on certain policies against the claim of the assignee for money on deposit with him as banker.

It is not in the report of *Scammon* v. *Kimball* that the learned Chief Judge finds authority for his assertion that the decision indicates an opinion by this Court on the same question that is involved herein. To quote his own language:

> "The report of the case does not show when the claim on the insurance policies matured, but that fact appears from the

> opinions in two subsequent cases decided by the same court (*Carr* v. *Hamilton*, 129 U. S., 249 (252); *Scott* v. *Armstrong*, 146 *id.*, 499) in which it is stated that the claim for fire losses in the *Scammon* case did not mature until after the *insolvency* of the insurance company."

The question before this Court is not whether a setoff of the character sought is permissible when the debt which is to be setoff was not matured at the time of the *insolvency;* the question for determination is whether a setoff is permitted when the claim which is to be setoff was not matured when *the trustee in bankruptcy* took title to the assets of the insolvent.

Though the Insurance Company in *Scammon* v. *Kimball* was insolvent before the maturity of the obligation sought to be setoff, yet there is no statement in the report nor in the two subsequently decided cases referred to that would indicate that the obligation had not matured at the time of the *filing of the petition* in bankruptcy, and when recourse is had to the records of this Court for the facts, they reveal a case which makes the decision utterly inapplicable to the appeal *sub judice.*

The printed record, exclusive of the briefs of counsel, in Scammon *vs.* Kimball, is found in Vol. 5, October Term, 1875, page 3960 (Transcript of Records, 1875, on file in the office of the Supreme Court U. S.). On page 3966 of these records the answer to the original bill of the complainant Scammon contains the following uncontroverted statement:

> "That the petition to declare said Company bankrupt was filed in the District Court of the United States for the Northern District of Illinois by one Franklin McVeagh on the *20th day of January, A. D. 1872;* that said Company was on said peti-

> tion adjudicated bankrupt by decree of said District Court on the 27th day of January, A. D. 1872."

Among the stipulated facts in the case we find, page 3969:

> "That at the time of the fire on the 8th and 9th days of October, A. D. 1871, J. Young Scammon (the complainant) held policies or contracts of insurance of the Mutual Insurance Company, upon which losses were then sustained to the amount of Forty-five Thousand Fifteen 33/100 dollars ($45,015.33), and that *that sum became due thereupon to said Scammon from said Company sixty days after notice, on proofs once* (the brief for appellant has *'at once,'* which was doubtless the fact) made to said Company under such policies," etc.

It is therefore obvious that at the time of filing the petition in bankruptcy, viz., the 20th day of January, 1872, three months and eleven days after the fire, all the conditions required to mature the obligation upon the policies had been performed, and the amount thereof was then due and payable, so that the equity jurisdiction exercised by the Court was the ancient and ordinary set-off of debts that were both due and payable before the intervention of the bankruptcy proceedings. The question whether the deposit held by the complainant could have been used as a set-off against the claim of the trustee in bankruptcy in case the conditions required to mature the policies had not been performed at the time of the institution of the bankruptcy proceedings was, therefore, not before the Court and certainly was not decided.

We have never asserted that it is not permitted to a solvent creditor, against whom exists a present claim to set off against it an unmatured claim

against his insolvent debtor, where the rights of the parties only are involved. This is the principle adverted to by the Judges in the *dicta* of their opinions in the cases referred to by Chief Judge Cullen. But when insolvency of one of the debtors and proceedings for the benefit of all his creditors intervene between the respective dates of maturity of the two debts, then there is, or there is not, a right of equitable set-off of the debts according to which of the two debts it is that matures before the bankruptcy.

In Scott *v.* Armstrong the question to be determined was whether a creditor with a present claim against an insolvent could precipitate the date of maturity of the claim the insolvent had against him. That principle is not involved in the appeal at bar. It constitutes an entirely different case.

The distinction is made obvious by the following from the opinion of Mr. Justice Peckham in the Court of Appeals of New York:

> "But where a debt is due from the insolvent, *and it is a debt from the other party to the insolvent which is not due*, the Court does not change the contract against the will of the parties, but it simply takes the waiver of the debtor whose debt is not yet due, and only by his consent and at his request treats it as due at once."
>
> Richards *v.* LaTourette, 119 N. Y., 54, 59.

And again:

> "It has been frequently held that, as to the right of setoff in equity, the fact that the debt owing to the insolvent is not due when he makes an assignment is entirely immaterial. The setting it up as an offset is a waiver by the debtor of any defense upon the ground that the debt is not due, and such waiver of the right to demand the full time

> in which to pay his debt can lawfully and properly be made by *the debtor.*"
>
> Opinion of the Court per Peckham, *J.*, in Rothschild *v.* Mack, 115 N. Y., 1, 8.

We submit, with all respect, that Chief Judge Cullen was mistaken in the statement

> "That the law of equitable setoff in the Supreme Court of the United States seems to be different from that which prevails with us."

Schuler *v.* Israel (120 U. S., 506), which he cites to substantiate his claim of a conflict of authority, states no different rule than that contained in Fera *v.* Wickham *et al.*, 135 N. Y., 223, where on page 227 of the opinion Judge Gray says:

> "The natural equity in offsetting cross demands, which had its rise in the rule of the civil law, was soon adopted by the Court of Chancery in cases where, from the situation of the parties, cross actions at law were inadequate. Hence, if one of the parties should become insolvent, the insolvency was recognized as presenting a case for equitable interference. *But the rule was limited in its application to cases where the equitable rights of others were not interfered with.*"

And Judge Gray, in disposing of the issue actually before the Court in Fera *v.* Wickham, stated the equitable doctrine in the following manner:

> "The question here is whether the plaintiff has an equitable right to an offset of his demand against the insolvent estate which had not matured at the time of the assignment, but which did subsequently mature before the demand held by the assignee against him matured. In the solution of this question we might find some embarrassment in endeavoring to reconcile expressions of opinion by the

> judges in earlier cases, and after a very careful consideration I am disposed to hold that by an assignment in trust for the assignor's creditors, what natural equities previously existed become suspended by an intervention of the rights of other creditors.
>
> Fera *v.* Wickham *et al.*, 135 N. Y., 226, 227.

The apparent misapprehension in the mind of Chief Judge Cullen that there exists any conflict between the decisions of this Court and the Court of Appeals on the subject of equitable setoff seems to issue from the case of Carr *v.* Hamilton, in which this Court in treating of the present value of life insurance policies as property and objects of setoff, established a different rule from that which had been held by the Court of Appeals of the State of New York. This view did not arise from any difference of opinion as to the law involved with regard to equitable setoff, but was predicated upon a difference in the manner in which the respective courts regarded the cash surrender value of a policy.

In *Carr* v. *Hamilton,* the appellant supported his contention by the case of Newcomb *v.* Almy, 96 N. Y., 308. The following excerpt from the opinion of this Court, delivered by Mr. Justice Bradley, clears up the difficulty experienced by Chief Judge Cullen in contrasting the decisions:

> "That case (Newcomb *v.* Almy) was almost parallel with the present one, and the claim of setoff was disallowed. The suit was brought by the receiver of an insolvent life insurance company against the holder of an endowment policy issued by the company to recover the amount of a promissory note. The defendant, as in this case, sought to set off the value of his policy against the note. The policy was not yet due and in case the defendant died before it became due, the

amount was payable to his wife. The court assumed that the interests of the assured and his wife were so involved together that they could not be separated; and that it did not yet appear who would be entitled to the insurance,—not adverting to the fact that the interests of all the parties became fixed by the insolvency of the company, and must be computed as expectancies reduced to present values. It is true, the court does, in the next sentence, concede that the policy had a reserve value,—but asks, 'To whom was that value payable?' The plain answer was at hand, that the reserve value of each person's interest was payable to him or her. We cannot but think that if the true character of the interests in question had been brought to the attention of that learned court, it would have come to a different conclusion from that which was reached."

Carr *v.* Hamilton, 129 U. S., 259, 260.

The doctrine of equitable setoff established by decisions of this Court is not different from that contained in the decisions of the State of New York, and of the highest courts of other jurisdictions.

Matter of Hatch, 155 N. Y., 401, 405.

Manufacturers National Bank *v.* Jones, 2 Pennyp., 377.

Chipman *v.* National Bank, 120 Pa., 86.

Jones *v.* Piening, 85 Wis., 264.

Union National Bank *v.* Hicks, 67 Wis., 192.

Oakman *v.* Batavian Bank, 77 Wis., 501.

McCagg *v.* Woodman, 28 Ill., 84.

Counsel for appellee upon this motion has not referred the Court to any of its decisions showing that Section 68 of the present act and its corre-

sponding provision of the former acts provided a different rule with regard to equitable setoff from the general rule of equitable setoff, for which the appellant is here contending. On the contrary, the cases in this Court under the Act of 1867 established this principle, that the section relating to setoffs:

"Was not intended to enlarge the doctrine of setoff or to enable a party to make a setoff in cases where the principles of legal and equitable setoff did not previously authorize it."

Sawyer *v.* Hoag, 17 Wall., 610 (622 of the opinion of Mr. Justice Miller).

Under the same statute, Mr. Justice Bradley, construing the same section, held that a claim of setoff could be maintained only upon the same general principles of equity recognized by the courts of equity in cases of setoff. In effect, his decision declared that the use of the terms "mutual debts" and "mutual credits" under the act allowed only the application of the legal and equitable doctrines that had already been fixed by the decisions of the courts of law and equity and nothing more.

Gray *v.* Rollo, 18 Wall., 629, 632.
See also Libby *v.* Hopkins, 104 U. S., 303, 309.

That the views expressed by this Court under the former act are still held by it under the present act is evident from the opinion in the case of Western Tie & Timber Co. *v.* Brown, 196 U. S., 502, citing under the former law the decision of this Court in Libby *v.* Hopkins, 104 U. S., 303.

We conclude, therefore, that no decision of this Court has been shown that is decisive against this

appellant. In fact, those cases in which the Court has indicated its views are authority rather for the position of the appellant.

We, therefore, contend that the question arising on the merits is not of a character to be disposed of on a motion to affirm.

Respectfully submitted,

MARTIN CONBOY,
Of Counsel for Appellant.

Addendum.

LEO FRANK, as Trustee in Bankruptcy of SOLOMON ULLMAN, Appellant, *v.* THE MERCANTILE NATIONAL BANK OF THE CITY OF NEW YORK, Respondent.

1. BANKRUPTCY—WHEN UNMATURED NOTES OF BANKRUPT MAY BE SET OFF IN ACTION UPON CLAIM AGAINST DEBTOR OF BANKRUPT—WHEN RULE OF FEDERAL COURTS PREVAILS INSTEAD OF RULE IN THIS STATE. Under the U. S. Bankrupt Law (§§ 63, 68) notes made by a bankrupt, but not due at the time of his bankruptcy, are provable against his estate and may, therefore, be set off in an action, brought in the courts of this state by the assignee in bankruptcy, upon a claim against the holder of the notes, but only to the extent necessary to extinguish such claim; since in cases arising under the Bankrupt Law, the courts of this state should be governed by the law of set-off as it prevails in the Federal courts and not by that obtaining in our own courts under which claims unmatured at the time of insolvency cannot be set off against claims held by the assignees of insolvents.

2. WHEN OBLIGATION OF BANKRUPT MAY BE SET OFF ALTHOUGH ACQUIRED AFTER COMMENCEMENT OF PROCEEDINGS. The rule that after insolvency a debtor to the insolvent cannot acquire his obligation for the purpose of using it as a set-off or counterclaim, has no application where the obligation was acquired before the debtor assumed the liability upon which he is sued and, therefore, could not have acquired it for the purpose of using it as a set-off.

Frank v. *Mercantile Nat. Bank*, 100 App. Div., 449, affirmed.

(Argued May 30, 1905; decided June 13, 1905.)

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the first judicial department, entered January 23, 1905, which reversed an interlocutory judgment of Special Term sustaining a demurrer to the answer and overruled such demurrer.

The following questions were certified:

"1. Do the first, second, third, fourth, fifth, sixth or seventh counterclaims set forth in the answer of the defendant herein state facts sufficient to constitute a cause of action against the plaintiff?

"2. Are the second, third, fourth, fifth, sixth and seventh set-offs set forth in the answer of the defendant herein insufficient in law upon the face thereof?"

The nature of the action and the facts, so far as material, are stated in the opinion.

CULLEN, *Ch. J.* The action is brought by an assignee in bankruptcy to recover the amount of a deposit made by the bankrupt in the National Broadway Bank. It is alleged in the complaint "that prior to the commencement of the action and in or about the month of May, 1903, the National Broadway Bank duly assigned, transferred and set over to the defendant all the property, assets and effects of said bank, and the defendant agreed to assume the payment of and to pay all the liabilities of said bank." The answer of the defendant admitted the plaintiff's claim and pleaded as a set-off and counterclaim seven promissory notes made by the bankrupt to the National Broadway Bank and assigned to it by that bank in April, 1903. Of these notes only one had matured before the adjudication in bankruptcy. That note is conceded to be a proper set-off. The question presented is whether the defendant has the right to set off the six other notes. The Special Term held that they were not a good

set-off because they had not matured at the time the title passed from the bankrupt to his assignee. The learned Appellate Division has held to the contrary.

If the defendant's rights depended on the equitable rule of set-off as it obtains in this State, it is clear that the notes held by it which had not matured at the time of the transfer of the title from the bankrupt to his assignee could not be set off against the plaintiff's claim. *Fera* v. *Wickham* (135 N. Y., 223) is a conclusive authority to that effect, and so the respondent's counsel concedes. The defendant's claim to a set-off, however, is not based upon the rule in equity which prevails with us, but on the provisions of the Bankrupt Law. Section 68 of that law provides that "In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." Section 63 provides: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, * * * with a rebate of interest upon such as were not then payable and did not bear interest."

The argument is that as unmatured claims against the bankrupt are provable against his estate, they necessarily are the subject of set-off under the provisions of Section 68. We think that this position is well taken, but we shall refrain from entering into any discussion of the question, as the proposition seemed to be settled by decisions of the Federal courts. The uniform current of authority in the District and Circuit Courts of the United States is to that effect and the law is so stated in

the text books on bankruptcy. (*Re City Bank of Savings*, Fed. Cas. No. 2,742; *Ex parte Howard Nat. Bank*, Fed. Cas. 6,764; *Re Kalter*, 2 N. B. N. R., 264; *Re Little*, 6 Am. B. R., 681; *Myers* v. *Dickenson*, 5 Am. B. R., 595; *Union Nat. Bank* v. *McKay*, 2 N. B. N. R., 913; *Re Phillip Semmer Glass Co.*, 11 Am. B. R., 665; Collier on Bankruptcy [4th ed.], p. 498; Brandenburg on Bankruptcy, § 1131.)

Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammon* v. *Kimball* (92 U. S., 362), which arose under the Bankrupt Law of 1867, the provisions of which, so far as they deal with the questions involved in this case, are substantially the same as the present law. (*N. Y. County Bank* v. *Massey*, 192 U. S., 138.) That was an action against the assignee in bankruptcy of a fire insurance company. The complainant was allowed to set off the sums owing him on certain policies as against a claim of the assignee for money on deposit with the complainant as a banker. The report of the case does not show when the claim on the insurance policies matured, but that fact appears from the opinions in two subsequent cases decided by the same court (*Carr* v. *Hamilton*, 129 U. S., 249; *Scott* v. *Armstrong*, 146 *id.*, 499), in which it is stated that the claim for fire losses in the *Scammon* case did not mature until after the insolvency of the insurance company.

It may be further stated that the law of equitable set-off in the Supreme Court of the United States seems to be different from that which prevails with us. In *Schuler* v. *Israel* (120 U. S., 506), which arose out of the attachment of a deposit in a bank, it was held that the bank could, as against the attaching creditor, set off all notes of the debtor in the attachment suit held by it, whether matured or not matured at the time of the attachment. Judge

Miller there said: "While it may be true that in a suit brought by Israel against the bank it could, in an ordinary action at law, only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due, would be lost, be relieved by a proper decree in equity." So also in *Carr* v. *Hamilton* (*supra*), which was an action brought by the receiver of an insolvent life insurance company to foreclose a mortgage given to it by the holder of an endowment policy, the policyholder was allowed to set off as against the mortgage the present value of the policy which would not mature for some years. As the Bankrupt Law operates through the whole country, the construction to be given to it must necessarily be uniform throughout all the States, not varying with the local law. Therefore, in construing it we should be governed by the law of set-off as it prevails in the Federal courts and not in our own. In the light of the decisions quoted, as well as under the terms of the Bankrupt Law, we conclude that the defendant had the right to set off the notes which it held against the bankrupt, even though these notes had not matured at the time of the insolvency.

The counsel for the appellant objects to the validity of the set-off on the further ground that the defendant acquired the notes in controversy after the proceedings in insolvency. It is, doubtless, as claimed, the law that after insolvency a debtor to the insolvent cannot acquire his obligation for the purpose of using it as a set-off or counterclaim. It was stated on the argument of this appeal that the notes were acquired in the same transaction by which the defendant assumed the liability on which it is now sued; that is to say, when it took over the

assets of the National Broadway Bank, in consideration thereof it assumed this obligation. This fact was not challenged on the argument, although it does not seem to be distinctly stated in the answer. Nevertheless, it does appear by the allegations of the complaint and answer that the defendant acquired the notes in April, 1903, while it assumed the obligation on which it is sued in May of that year. As on the face of the pleadings the notes were acquired before any obligation was entered into by the defendant to pay the plaintiff's claim, it is difficult to see how they could have been procured with any intention to defeat that claim. Doubtless, the fact is as was stated by the counsel, and we have, therefore, treated the defendant as being in the same position and entitled to the same rights as those occupied and possessed by the Broadway bank previous to the assignment.

Of course, the defendant is not entitled to any affirmative judgment against the assignee for the excess in the amount of the notes over the amount of the deposit. It is entitled to use those notes solely as a set-off. The judgment of the Appellate Division simply overrules the demurrer without stating the extent of the relief to be awarded the defendant. The opinion, however, shows that the Court intended to allow the defendant's counterclaim only to the extent necessary to extinguish the plaintiff's claim.

The order and interlocutory judgment appealed from should be affirmed, with costs, and the questions certified answered in the affirmative.

Gray, O'Brien, Bartlett, Haight, Vann and Werner, *JJ.*, concur.

Order affirmed.

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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 54.

MARTIN CONBOY, AS TRUSTEE IN BANKRUPTCY OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, BANKRUPT,

Appellant,

against

THE FIRST NATIONAL BANK OF JERSEY CITY,

Appellee.

BRIEF FOR APPELLANT.

MARTIN CONBOY,
Of Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 54.

MARTIN CONBOY, as Trustee in Bankruptcy of the PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt,
Appellant,

AGAINST

THE FIRST NATIONAL BANK OF JERSEY CITY,
Appellee.

Brief for Appellant.

This is an appeal under Section 25-b of the Bankrupt Act (pp. 26 to 28) from an order of the United States Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court of the United States for the Southern District of New York, which in turn affirmed the decision of a referee in bankruptcy in that district, allowing the claim of the First National Bank of Jersey City against the estate of the above-named bankrupt (p. 17).

Statement.

On March 18, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, in the District Court of the United States for the Southern District of New York, and a receiver was appointed on the same day. An order of adjudication was subsequently entered.

For some time prior to the filing of the petition, the bankrupt had an account of the ordinary and usual deposit character with the First National Bank of Jersey City, the appellee, and the receiver, on the day the petition was filed, served a certified copy of the order of his appointment on the bank. On that day the balance on deposit to the credit of the alleged bankrupt was $6,232.96. At the same time the bank held unmatured promissory notes, made by various makers, in favor of the bankrupt, which notes, upon endorsement by the bankrupt and in the ordinary course of business, had been discounted by the bank for the bankrupt's account, the bankrupt receiving thereon a sum largely in excess of the balance above mentioned. A schedule of the notes is found on page 30 of the record. The bank applied the balance *pro tanto* to the payment of the notes, and filed a claim for the remainder, amounting in all, including interest and fees, to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy, and as they matured payment thereof, respectively, was duly demanded and refused and notice of protest given to the bankrupt as endorser.

Upon presentation of proof of claim by the bankrupt (pp. 12-13), the trustee filed formal objections thereto and petitioned for its disallowance on the ground

> "5. * * * that the said bank had not the right to offset and counterclaim the amounts due upon unmatured paper upon which the claim of said bankrupt appeared as endorser against the amount due upon de-

> posit to the said bankrupt at the time of the filing of the petition in bankruptcy, for the reason that the respective obligations did not constitute mutual debts and mutual credits between the estate of the bankrupt and a creditor; that at the time of the filing of the said petition the account could not be stated and one debt set off against the other within the meaning of the Bankruptcy Statute" (p. 15).

Other grounds were stated in objection to the claim (pp. 14-16), but we shall present no other to this court.

After proofs taken and a hearing had, the referee rendered an opinion in favor of the validity of the claim (pp. 2-5), and an order was entered allowing it (p. 5). This ruling was subsequently affirmed by the judge of the District Court on petition to review (p. 17). An appeal was then taken to the Circuit Court of Appeals for the Second Circuit, which affirmed the previous orders in the case, the opinion being *per curiam* (p. 20), and an order to this effect was entered on January 23, 1905 (p. 21).

Although the order of the Circuit Court of Appeals was appealable to this court, *(Western Tie & Timber Company* v. *Brown, 196 U. S., 502; Rector* v. *City Deposit Bank, 200 id., 405)* no findings of fact and conclusions of law were made and filed, as required by General Order in Bankruptcy No. XXXVI, (3), and the judgment remained in this incomplete state until the present appeal was perfected, when such findings and conclusions were made and filed on June 14, 1905.

It was the holding of the learned Circuit Court of Appeals that

> "To determine * * * whether the holder of a claim is entitled to the benefit of Section 68, it is necessary only to inquire whether his claim is one provable in bankruptcy" (p. 20).

This opinion seemed at variance with the determination of this court in *Western Tie & Timber Company* v. *Brown, supra*, and, accordingly, on May 8, 1905, the trustee presented a petition for rehearing to the Court of Appeals, and this petition, having been duly considered by the court at the same term, was on May 24, 1905, denied (p. 24).

On May 27, 1905, a petition for an appeal to this court was presented to Mr. Justice Peckham and allowed, and a certificate was signed by him to the effect that, in his opinion, a determination by this court of the question involved in connection with the claim of the bank was essential to a uniform construction of the bankrupt law throughout the United States (p. 28). Errors were assigned, and the Circuit Court of Appeals having, as aforesaid, filed its findings of fact and conclusions of law (pp. 29 to 31), the appeal papers were filed in the office of the clerk of that court, and an appeal, conformably to Section 25-b of the Bankrupt Act, thereby perfected.

When the record was forwarded to this Court at the last term, a motion was made by the appellee to dismiss or affirm, the motion to dismiss being based on the contention that there was no jurisdiction in this Court to entertain the appeal, in view of the limitation fixed by General Order in Bankruptcy XXXVI, which provides as follows:

> "2. Appeals under the Act, to the Supreme Court of the United States from a Circuit Court of Appeals * * * shall be taken within thirty days after the judgment or decree and shall be allowed by a judge of the court appealed from or by a justice of the Supreme Court of the United States."

Briefs were submitted, and the Court reserved the motion for further argument at the hearing upon the merits.

Before proceeding to the specifications of error

it is desirable, therefore, to discuss the propriety of this appeal.

The appeal was properly taken.

The case was not finally disposed of by the Circuit Court of Appeals until the adjournment of the term at which the judgment was rendered. All judgments and decrees are under the control of the Court during that period, and may be opened or revised.

The petition for rehearing was addressed to the discretion of the Court. The Court duly considered it. By this the effect of the final decree was suspended. Substantially, the decree was not final until the 24th day of May, 1905, within thirty days from which date the appeal was perfected.

Brockett et al. v. *Brockett, 2 How., 238.*

In most of the Federal circuits the time in which the petition for rehearing must be presented has been limited by local rules; thus in the first circuit, a petition must be presented within one month; in the fifth, twenty days; sixth, thirty days; seventh, thirty days; and in the ninth, fifteen days after opinion or judgment.

The only provision governing petitions for rehearing in the second circuit is that contained in original rule 29 of the Circuit Court of Appeals, limiting the time for the presentation of such petition to the term at which the judgment is entered.

In accordance with the rule of the second circuit, the petition in question, as shown by the order denying the application for rehearing was presented at the term at which the judgment was entered, and therefore, under the decisions of this Court, operated as a suspension of the judgment until a determination thereon had been had by the Circuit Court of Appeals.

The time to appeal from the final decree did not begin to run until the petition for rehearing had been decided.

Aspen Mining & Smelting Company v. Billings, 150 U. S., 31.
Voorhees v. Noye Manufacturing Company, 151 U. S., 135.

Counsel for appellee, in connection with the limitation of time fixed by the General Order, contends that the short period of thirty days within which an appeal must be taken is intended to prevent the tying up of bankrupt estates by prolonged litigations over disputed claims. It will also doubtless be contended that in the cases cited by the appellant, holding that the time for appeal dates from the denial of a petition for rehearing, a rehearing in each instance was prayed for before the time for appeal had expired, whereas in the case at bar, owing to the short limitation of the time for appeal fixed by General Order XXXVI, the petition for rehearing was not presented until after the time for appeal prescribed by that General Order had expired. The next step in this contention will be that no court has power to extend the time for appeal after it has once expired. A similar contention was formerly made with regard to the shorter period of ten days within which, under the former provisions of the Judiciary Act, an appeal must be perfected, in order that it might operate as a *supersedeas*. The courts had no power to extend the time for allowing the supersedeas, after the time prescribed by statute therefor had expired. (*Kitchen* v. *Randolph, 93 U. S., 86.*) But this court has uniformly held that the ten days fixed by the former requirement and the sixty days now fixed by the provisions of the Judiciary Act within which a *supersedeas* may be allowed do not begin to run until a petition for re-

hearing or a motion to set aside the decree has been disposed of, and has so held in cases where the petition for rehearing was not filed until the time for *supersedeas* after the original judgment had expired.

The *Slaughter-House Cases, 10 Wall., 273*, were on writs of error to the Supreme Court of the State of Louisiana.

> "Petitions for rehearing were filed by the losing parties on the 26th of April, 1870, and on the 9th of May following an entry was made in each case that the petition for rehearing was refused. Writs of error to the state court were subsequently prayed by the same parties, and, on the 13th of May, last, the writs of error were allowed by the Associate Justice of this court, allotted to that circuit, and they were duly filed on the 16th day of the same month, as appears of record.
>
> "Filed as the writs of error were, within ten days from the date of the entry refusing the petition for rehearing, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas and stay execution, under the twenty-third section of the Judiciary Act. Doubts were at one time entertained upon that subject, but since the decision in the case of Brockett *v.* Brockett (2 How., 238) the question must be considered as settled, in accordance with the views of the plaintiffs."
>
> Mr. Justice Clifford in *Slaughter-House Cases, 10 Wall., 289.*

See also *Railroad Company* v. *Bradleys, 7 Wall., 575*; and *Memphis* v. *Brown, 94 U. S., 715.*

In the latter case the judgment, granting a peremptory mandamus, was entered on March 2nd, 1876. Afterwards, during the same term, May 20th, the city appeared and moved the Court to set aside the order of March 2nd; but this motion

was refused and that order re-entered as the final judgment of the Court in the premises. A writ of error was sued out upon this last judgment, and a supersedeas perfected, by giving the required bond within sixty days thereafter.

This Court, by Chief Justice Waite, ruled that

> " • • • the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of."
>
> *Memphis* v. *Brown, 94 U. S., 715, 716, 717.*

Texas & Pacific Railway Company v. *Murphy, 111 U. S., 488,* was on a motion to dismiss the writ of error united with a motion to affirm. The facts, as shown in the opinion of Chief Justice Waite, were as follows:

> "On the 29th of May, 1883, a judgment was entered by the Supreme Court of Texas affirming a judgment of the District Court of Harrison County. The following entry appears in the record under date of December 21st, 1883:
>
> " 'Appeal from Harrison.
>
> " 'THE TEXAS PACIFIC RAILROAD COMPANY v. JAMES MURPHY. } No. 422. Case 1111.
>
> " 'Opinion of the Court delivered by Mr. Justice Slayton. Mr. Chief Justice Willie not sitting in this cause.
>
> " 'Motion of the appellant for a rehearing in this cause came on to be heard, and the

same having been considered by the Court, it is ordered that the motion be overruled and the hearing refused; that the appellant, the Texas Pacific Railway Company, pay all the costs of this motion.

* * * * * *

"'It is expressly ruled in *Brocket* v. *Brocket*, which has been followed in many cases since, that if a petition for rehearing is presented in season and entertained by the Court, the time limited for an appeal or writ of error does not begin to run until the petition is disposed of. Slaughter House Cases, 10 Wall., 273, 289; Memphis *v.* Brown, 94 U. S., 715, 717. The motion for rehearing in this case was not decided until December 21st, and the writ of error was sued out and served within sixty days thereafter. This was in time to secure the supersedeas.'"

Texas & Pacific Railway Co. v. *Murphy, 111 U. S., 488, 489, 490.*

Of course, if the petition for a rehearing is not presented by a party who is entitled to present it, as in *Sage et al.* v. *Central Railroad Company et al., 93 U. S., 412, 418, 419;* or if it is not presented at the proper term, as in *Cambuston* v. *United States, 95 U. S., 285, 287,* so that the Court cannot entertain it, then the Court's disposition of it does not affect the original judgment. But the disposition of such a motion or petition when it is presented by a party entitled to do so within the proper time is in effect a re-entry of the original judgment appealed from.

The principle for which we are contending is nowhere expressed more simply or clearly than by Chief Justice Fuller as follows:

"* * * if a motion or a petition for rehearing is made or presented in season and entertained by the Court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree

> does not take final effect for the purposes of the writ of error or appeal. Aspen Mining & Smelting Co. *v.* Billings, 150 U. S., 31; Voorhees *v.* Noye Manufacturing Co., 151, U. S., 135; Brocket *v.* Brocket, 2 How., 238, 249; Texas & Pacific Railway *v.* Murphy, 111 U. S., 488; Memphis *v.* Brown, 94 U. S., 715; Northern Pacific Railroad *v.* Holmes, 155 U. S., 137."
>
> *Kingman* v. *Western Manufacturing Co., 170 U. S., 675, 678.*

Independently of the above considerations from which we draw the general conclusion that a possible rehearing is a necessary incident to every judgment or decree the right to which cannot be cut off during the term except by express statute or rule of Court, we submit that, in view of the irregular character of the judgment as entered, the time within which it might be appealed from had not begun to run up to the prosecution of this appeal.

A judgment or decree must be properly entered, in order to start the statute of limitation of the time to appeal.

> *Polleys* v. *Black River Improvement Co., 113 U. S., 81, 83.*
>
> *Rubber Company* v. *Goodyear, 6 Wall., 153.*
>
> *Yznaga Del Valle* v. *Harrison et al., 93 U. S., 233.*
>
> *United States* v. *Gomez, 1 Wall., 690.*

Where an appeal to this Court is permitted by the Bankrupt Act from a determination of the Circuit Court of Appeals, the judgment is not properly entered until the mandatory provision of subdivision 3 of General Order XXXVI has been complied with. The "making and filing" of the findings of fact and conclusions of law referred to therein is a necessary prerequisite to the proper entry of the judgment.

While these findings are not a part of the judgment itself, they are a formal prerequisite to its proper entry and, though they may be filed *nunc pro tunc* as of the date of the original entry of judgment, (or this is true, at least, of findings in a trial court, [*Insurance Co.* v. *Boon*, 95 *U. S.*, 117.]), yet the judgment is not properly entered until the date when they are actually made and filed.

The obvious purpose of subdivision 3 of the General Order in question is to relieve the Supreme Court of the onerous labor of examining lengthy records. The entry of the findings *nunc pro tunc* fully meets such a purpose, but, as the judgment is not properly entered until they have been filed, the date of the judgment for the purposes of limiting the time to appeal does not recur to the original entry of the judgment.

We, therefore, maintain that, in view of the fact that this appeal was instituted within thirty days from the entry of the order denying the petition for rehearing, this Court has jurisdiction to entertain this appeal. And, further, that, on account of the irregularity in the judgment, the time within which the proceedings on appeal should have been perfected had not expired when this appeal was taken.

Specification of Errors.

The issue raised by the proof of claim and the objections thereto was:

> Whether it is permissible, under the provisions of the Bankrupt Act, for a bank holding a balance on deposit to the credit of the bankrupt to utilize the same as a set-off against promissory notes endorsed by the bankrupt, which had not matured at the time of the filing of the petition in bankruptcy.

This issue the referee states and disposes of as follows:

> " * * * we have remaining only the question as to whether the fact that the notes here were unmatured at the time of the filing of the petition in bankruptcy eliminates that quality of mutuality which is required by Section 68, in order to permit of set-off.
>
> "The trustee's contention is that on the day of the filing of the petition there was no such mutuality; that there was, on that day, a debt due by the bank to the bankrupt, but no debt due by the bankrupt to the bank. He further contends that immediately upon the filing of the petition in bankruptcy other and paramount equities in favor of the general creditors of the bankrupt intervened, and became superior to the equities existing between he bankrupt and the bank; and immediately thereupon the fund in the bank became impressed with a trust in favor of the general creditors of the bankrupt and could not be retained by the bank alone.
>
> "The trustee in support of this contention cites authorities of the New York and Pennsylvania Courts, and there is no doubt that under the statutes of those States the law is as he declares it to be. But the Bankruptcy Act creates a different rule of set-off, or rather, perhaps, better, adds to the classes of cases to which the rule is to be applied.
>
> "At common law, and under the Statutes of New York and of other States, it is well settled that there can be no set-off unless the mutual debts are both due and payable in the hands of the parties for and against whom set-off is sought, that is to say, that unless they are presently payable as well as due the requisite mutuality does not exist (Munger *v.* Albany City Bank, 85 N. Y.. 580-586). Under the Bankruptcy Statute, however, by Section 63a, a debt is declared provable against the bankrupt estate, that

is, I take it, for the purposes of bankruptcy, payable out of the estate, although not by its terms payable until after the filing of the petition, if only it is absolutely owing at that time. The operation of this section seems to be to hasten in such cases, and for the purposes of bankruptcy administration, the maturity of the debt. * * *

"It seems to be the provability of the debt which is the criterion of its availability for the purposes of set-off. * * * The fact that Section 68b prohibits a set-off of any debt which is not provable would point inferentially to the same conclusion.

* * * *

"Nor should we overlook the use of the term 'mutual credits' in addition to the term 'mutual debts' in Sec. 68. While these terms are to be used as correlatives (Libby *v.* Hopkins, 104 U. S., 303), they are not to be construed as meaning one and the same thing (Lord Kenyon in Atkinson *v.* Elliott, 7 T. R., 378). The term mutual credits first appears in the English Bankruptcy System in the year 1705 (4 and 5 Anne, C. 17, Sec. 11), and it has been found in all of our bankruptcy acts from the beginning (Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073). It has from the first been considered of importance, and as adding materially to the cases which were held comprised under the term mutual debts.

* * * *

"On the whole, I conclude that the mutuality required by the Bankruptcy Act existed, and that the off-set was proper" (pp. 3 and 4).

The reasoning of the Circuit Court of Appeals is in the same vein. The *per curiam* opinion, in quoting Section 1, Subdivision 11 of the Bankruptcy Law, which provides that the word "debt" when used in said act "shall include any debt, demand

or claim provable in bankruptcy," applies the section as as follows:

> "That meaning must be given to the word when used in the set-off section (68): 'In all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.' To determine therefore whether the holder of a claim is entitled to the benefit of Section 68 it is necessary only to enquire whether his claim is one provable in bankruptcy" (p. 20).

This being the theory upon which the claim of the bank was allowed, we place our assignment of error on the ground that the rulings of the courts below were based upon an erroneous construction of the provisions of the Bankrupt Act relating to set-off.

POINT I.

Under the Bankrupt Law, the liability of the bankrupt as endorser upon unmatured promissory notes cannot be offset against a deposit owing to the bankrupt at the time of the filing of the petition.

The provisions of the present Bankrupt Act, relating to offset and counterclaim, are found in Section 68, which is as follows:

> "Set-offs and counterclaims. (*a*) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a

creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid.

(*b*) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

This section is practically identical with a like section in the former bankrupt acts (*Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073*), and goes back to the original English Bankrupt Act (*4 and 5 Anne, c. 17, Sec. 11*). It would be somewhat interesting to trace the origin and history of the doctrine of set-off, which first appears in the civil law under the name of *compensatio*, and is now adopted and preserved as the law of those countries where the principles of the civil law prevail (*Code Nap., Lib. 3, Tit. 3, Chap. 4, Sec. 398; Code Civ., 1289, 1291; Inst. of Law of Spain, Lib. 2, Tit. VI, ch. 5, Sec. 4; Vanderlinden's Inst. Law of Holland, Lib. 1, c. 18, Sec. 4*). It was a doctrine that was not known or adopted in the common law of England, though Chancery recognized the right, and the Statutes of set-off (*2 Geo. II, c. 27, Sec. 13; 8 Geo. II, c. 24, Sec. 76*) were passed mainly to obviate the necessity of a resort to Chancery in every case of mutual independent claims upon both sides (*Blake* v. *Langdon, 19 Vt., 485*).

In the civil law when the doctrine of compensation was invoked, all matters in dispute between the parties were adjusted (*Blake* v. *Langdon, supra*). All that was required was that "the debt or claim to be compensated should be certain, de-

terminate and actually due and in the same right and of the same kind as that of the other side." (*Story's Eq. Jurisprudence, Secs. 1440, 1441*). As debts of which the time of demand had not arrived were not compensated with those which were due, the right of compensation did not arise from the making o' a contract or the creation of an indebtedness, but only from the time when mutual debts became due. (*Domat, Part 1, Book 4, Tit. 2, Sec. 2, par. 2298*). In this respect, compensation, which, as we have said, was the prototype of the doctrine of set-off, differed from reconvention (Waterman on Set-off, Sec. 628).

The practice of set-off was recognized by courts of equity long before it was known to courts of law, and consequently the equity jurisdiction is not based upon any statutes of set-off and would exist as well without any such statutes as it now does, the doctrine having been taken directly from the civil law.

The primitive notion of an action at law did not admit the possibility of a defendant being an actor and interposing a claim against the plaintiff to be tried in the one suit. Lord Mansfield undertook to give a reason for this condition. He said:

> "Natural equity says that cross demands should compensate each other by deducting the less sum from the greater, and the difference is the only sum which can be justly due, but positive law, for the sake of the forms of proceedings and convenience of trial, has said that each must sue and recover separately in separate cases."

The want o' such a doctrine at law was found to result in great injustice. Lord Mansfield declared:

> "That the natural sense of mankind was first shocked at this doctrine in the case of bankrupts. They thought it hard that a person should be bound to pay the whole

that he owed to a bankrupt and receive only a dividend of what the bankrupt owed him." Green *v.* Farmer, 4 Burrows, 2214, 2220.

The defense of set-off was provided for in England in law cases, as above indicated, by the statutes of set-off, 2 Geo. II and 8 Geo. II, and some subsequent statutes were passed mainly to obviate the necessity of a resort to chancery in every case of mutual independent claims upon both sides (*1 Petersd. Abr.* (*417*), *301, and note*). The general statute of set-off of 2 Geo. II was restricted to mutual debts, while that in regard to bankrupts extended to mutual credits. In regard to the latter statute, the administration of which was altogether under the supervision of the court of chancery, that court has exercised both an equitable and legal jurisdiction (*Blake* v. *Langdon, supra*).

The right of set-off beginning with the doctrine of *compensatio* in the civil law (*Gai. IV, 61*) was early introduced into the administration of English justice by the courts of equity and first adopted by express legislation in bankruptcy proceedings in 1705. The extension of the doctrine to include mutual debts and mutual credits under the Bankrupt Act harmonized the practice with that of the chancery court, and put in practice in bankruptcy cases the civil law doctrine of *compensatio* to the extent that that doctrine had been adopted by the equity courts. It is, therefore, unnecessary to discuss the defense of set-off, as applied in common law cases, because it is impossible to conceive of a common law action involving a bankrupt estate without at the same time supposing the application of the Bankrupt Act. The discussion, therefore, narrows itself down to an application of the doctrine of equitable set-off to the case at bar. It

may be said, in passing, that by Sec. 2, Subdivision 15, of the Bankrupt Act, express equitable jurisdiction has been conferred upon courts of bankruptcy in the administration of the act.

Before entering upon the discussion proper, it is desirable to set forth some general principles applicable to this provision of bankrupt law, which have already been laid down by this court.

Mr. Justice Miller, in construing the provisions of the act of 1867, in relation to set-off and counterclaims, said:

> *"This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it."*
>
> *Sawyer* v. *Hoag, 17 Wall., 610, 622.*

In the case of *Libby* v. *Hopkins, 104 U. S., 303,* Mr. Justice Woods, in writing the opinion of the court, distinguished the American Bankrupt Act from the English Bankrupt Act (5 Geo. II), and held that the terms credits and debts were used as correlatives in our statute, stating that a debt on one side was a credit on the other. *"So that the term 'credits' cannot have any broader meaning than the term 'debts.'"*

Libby v. *Hopkins, 104 U. S., 303, 309.*

Under the same statute, Mr. Justice Bradley, construing the same section, held that a claim of set-off could be maintained only upon some general principle of equity recognized by the courts of equity in cases of set-off. In effect his decision declared that the use of the terms "mutual debts" and "mutual credits" in the act allowed only an application of the legal and equitable doctrines that had already been fixed by the courts of law and equity *and nothing more.*

Gray v. *Rollo, 18 Wall., 629, 632.*

These cases determine conclusively that the Bankrupt Act does not create a new law of set-off, and indicate quite clearly that no cases for the application of that doctrine are permitted by the act other than those which have always been permitted by courts of equity.

This is important, in view of the fact that there is nothing definitive in the section of the Bankrupt Act relating to set-off; nothing to indicate the exact jurisdiction of the bankruptcy court in applying the doctrine.

What, then, is the doctrine of courts of equity respecting an offset of a matured against an unmatured claim?

The equitable doctrine is well expressed in cases involving claims against insolvent estates, and State courts in such cases have frequently applied the rule that a matured claim against a creditor of the estate cannot be offset against an unmatured claim owing by the estate.

In *Beckwith against Union Bank, 9 N. Y., 211,* the plaintiff, an assignee for the benefit of creditors, sued to recover the balance of $3,600, which at the time of the assignment was standing to the credit of the insolvent firm as depositors in the Union Bank of New York. The facts showed that on the 24th day of August, 1850, the assignors had executed to the plaintiff a general assignment of all their property and effects in trust for the benefit of their creditors. On the 19th of July previous, the bank had discounted for the assignors a bill of exchange for $3,914 drawn in favor of the assignors, and by them endorsed. The bill matured on the 27th of August, three days after the assignment, and having been protested for non-payment, the bank charged it against the assignors in their account and claimed to have thereby applied the deposit in payment. On the following day the plaintiff gave notice of the assignment and de-

manded the funds. The referee before whom the cause was tried reported a judgment in favor of the plaintiff for the amount claimed, and the judgment on his report having been affirmed at General Term, defendant took the appeal. After disposing of the question of set-off as affected by the provision of the Code of Civil Procedure, Johnson, *J.*, of the Court of Appeals held with respect to the assumed right of the bank to apply the amount on deposit in payment of the amount due upon the protested paper, as follows:

> "Nor had the bank any lien upon the deposits of the Hunters which would have prevented their drawing out the whole balance of cash to their credit on the 24th of August. This right passed to the plaintiff by the assignment; no notice was necessary to perfect that right in the assignee, except only that, in default of notice, the bank might have so dealt, as by its subsequent acts, to have affected its rights; there is no evidence of any such dealing in the case."
>
> *Beckwith* v. *Union Bank, 9 N. Y., 211, 212.*

The facts discussed in the above case are identical with the facts in the case *sub judice* and the expression of law seems to us to be just as applicable.

The same opinion has been expressed in many subsequent cases in the New York Court of Appeals down to a very recent date, and is the law of that State to-day.

> "The general rule relating to this subject is that claims or demands sought to be set-off must not only be mutual to the extent that they are owing by each to the other, but they must be due and payable, and, therefore, a claim not due cannot be set-off against one that may be presently enforced. To this rule there are perhaps some excep-

tions, as in the case of the insolvency of one of the parties, or where an assignment has been made. And yet, even in those cases, the party claiming the right of set-off is not entitled to such relief unless his claim has matured before the assignment or transfer (*Martin* v. *Kunzmuller*, *37 N. Y., 396, 397*; *Jordan* v. *Nat. S. & L. Bank*, *74 N. Y., 467*; *Fera* v. *Wickham*, *135 N. Y., 223*; *Matter of Hatch*, *155 N. Y., 401*)."

DeCamp v. *Thomson*, *159 N. Y., 444, 448.*

"In other words, if there is no right of set-off when an insolvent assignment is made, it cannot arise afterwards in favor of a creditor. Cross demands which do not mature until after such an assignment, could not have been the subject of set-off, when the assignment was made; for a demand *in presenti* is necessary to an allowance by way of set-off.

I think the logical and natural extension of the principle of the decision in Meyers *v.* Davis is authoritative in the decision of the present case. The right of set-off must attach at the time of the making of the assignment. It cannot arise afterwards, for the reason that the claim in favor of the estate has passed to the assignee, and to allow a set-off would be to the prejudice of other creditors. I think the principle to which we should adhere is this: When a party asks to have a set-off against a demand upon him held by an assignee for the benefit of creditors, a claim against the insolvent estate, it will be allowed, provided his was a claim upon the estate, due when the assignment was made; upon the ground, that by reason of the existence of cross demands at the time of the assignment, which were due (or might have become due at the creditor's election), an equitable adjustment by set-off is made without interfering with the equities of others. But after the estate has passed to an assignee upon a trust to hold for and dis-

tribute, among creditors, the former and natural equity disappears in superior equities vesting in the general body of creditors. They are then interested in having equality of distribution, and if a creditor, who, when the assignment was made, had no right to any off-set, may be allowed it afterwards, he gains a preference. By the intervention of the right of third persons, under the assignment, the equities change with the change in the situation of the original parties, to the misfortune of the creditor holding the demand against the insolvent estate, but, nevertheless, in accordance with the equitable principles as I deduce them from the decisions."

Fera v. *Wickham, 135 N. Y., 223, 229.*

"The principle upon which the rule proceeds is, that in case of mutual debts it is only the balance which is the real and just sum owing by or to the insolvent. Hence, when the assignee in this case became vested with the assets of his insolvent assignor, he took the contract above mentioned which had not then matured into a claim or right of action, but which did mature in his hands some years thereafter. He acquired no greater right than his assignor had prior to the assignment, had the claim then matured, and since Huntingdon had prior to the assignment a valid existing set-off against what the assignee took, that right was not lost or impaired by the assignment. The rights of the parties being adjusted in equity as of the date of the insolvency, all the assignee took as assets was the balance subsequently accruing on the contract, after deducting Huntingdon's debt due against the assignor before the rights of creditors intervened.

Had Huntingdon's debts accrued after the insolvency, as that of the assignee did, then equity would not permit the set-off and the case would come within the rule laid down in Fera *v.* Wickham (*supra*), but, as already

shown, such was not the case. When the debt of the party claiming the set-off does not exist when the insolvent estate passed into the hands of a trustee for creditors, but accrued subsequently during the administration of the estate, then the equities of other creditors will intervene to prevent the depletion of the assets in the hands of the trustee by extinguishing a good debt due to the estate by a bad one due to the creditors from the estate. In all cases of mutual debts, it is the insolvency of one of the debtors and the rights of the other creditors in the assigned estate that equity takes notice of, and modifies the legal right of set-off accordingly in order to promote equality and justice. But that condition of things exists only from the time when the assignment takes effect, and while it is the general rule in the administration of insolvent estates that equality among creditors is equity, yet the Court will not ignore the principle that it is only the balance in case of mutual debts or obligations which is the real sum owing by or to the insolvent, and the assets in the hands of the trustee for distribution to creditors are measured by this rule. Equity always regards as done what ought to have been done, and hence in this case it applies the past due debt of Huntingdon existing at the time of the assignment, upon his unmatured obligation in the hands of Hatch which passed to the trustee (*Hughitt* v. *Hayes, 136 N. Y., 163*).

This is the rule that prevails with respect to the right of set-off in the Supreme Court of the United States. In *Scott* v. *Armstrong* (*146 U. S., 499*) the receiver of an insolvent national bank sought to recover upon a note which fell due after his appointment. The maker of the note claimed a right to set off against his obligation a sum of money deposited to his credit with the bank prior to the insolvency. The precise question certified to the court for its decision was this: 'Where a national bank becomes in-

solvent and its assets pass into the hands of a receiver appointed by the Comptroller of the Currency, can a debtor of the bank set-off against his indebtedness the amount of a claim he holds against a bank, supposing the debt due from the bank to have been payable to a time subsequent thereto? The court answered the question in the affirmative and in delivering the opinion the learned chief justice said: 'Where a set-off is otherwise valid it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent. * * * The state of case where the claim sought to be set off is acquired after the act of insolvency is far otherwise, for the rights of the parties become fixed as of that time, and to sustain such a transfer would defeat the object of these provisions. The transaction must necessarily be held to have been entered into with the intention to produce its natural result, the preventing of the application of the insolvent's assets in the manner prescribed."

Matter of Hatch, 155 N. Y., 401, 405.

In *Mfrs. Nat. Bank* v. *Jones, 2 Pennyp. (Pa.), 377*, it was held that a bank garnishee of the deposit account of an insolvent had no right to insist upon set-off for an unmatured claim.

In *Chipman* v. *National Bank, 120 Pa., 86*, an assignee for the benefit of creditors brought suit to recover the amount which the assignor had deposited in defendant bank, and the bank sought to set-off notes due it which did not mature until after the assignment. The Court there declared that at the date of the assignment the bank had no lien or set-off against the amount then deposited, and that as a creditor of the assignor, holding notes that matured after all the property, including money on

deposit, had passed to the assignee in trust for all creditors, the bank was in no better condition than they were.

The logic of these cases is that the debt from the creditor becomes vested in the representative of the insolvent by operation of law for the benefit of all the creditors of the insolvent, while the creditor claiming the set-off holds only an obligation of the insolvent.

Our contention, therefore, is, that when a party asks to have his claim against an insolvent estate set off against a demand upon him held by a trustee for the benefit of creditors, it will not be allowed unless his claim upon the estate was due when the assignment was made. The allowance of his claim, if due, is placed upon the ground that by reason of the existence of cross demands at the time of the assignment, which were due or might have become due at the creditor's election, an equitable adjustment, by way of set-off, is made without interfering with the equity of others. (*Munger* v. *Albany City National Bank, 85 N. Y., 580.*) But if the estate has passed to a trustee upon a trust to hold for and distribute among creditors, the former and natural equity disappears in a superior equity, vesting in the general body of creditors. The latter are then interested in having equality of distribution, and if a creditor, who, when the assignment was made, had no right of set-off, is allowed it afterward, he gains an actual though not a technical preference. By the intervention of the rights of third persons, under the assignment, the equities change with the change in the situation of the original parties, to the misfortune, perhaps, of the creditor holding the demand against the insolvent estate, but, nevertheless, in accordance with equitable principles.

DeCamp v. *Thompson, 159 N. Y., 444.*

Matter of Hatch, 155 id., 401.
Fera v. *Wickham, 135 id., 223.*
Hughitt v. *Hayes, 136 id., 163.*
Newcomb v. *Almy, 96 id., 308.*
Jordan v. *National Shoe, etc., Bank, 74 id., 467.*
Martin v. *Kunzmuller, 37 id., 397.*
Myers v. *Davis, 22 id., 489.*
Beckwith v. *Union Bank, 9 id., 211.*
Bradley v. *Angel, 3 id., 475.*
Oatman v. *Batavian Bank, 77 Wis., 501.*
Union Nat. Bank v. *Hicks, 67 Wis., 192.*
Jones v. *Pienning, 85 Wis., 264.*
Spaulding v. *Backus, 122 Mass., 553.*
Brown v. *New Bedford Bank for Savings, 137 Mass., 262.*
Bosler v. *Exchange Bank, 4 Pa. State, 32.*
Manufacturers National Bank v. *Jones, 2 Pennyp., 377.*
Chipman v. *National Bank, 120 Pa. State, 861.*
Appeal of Farmers, etc., Bank, 48 Pa. State, 57.
Huse v. *Ames, 104 Mo., 91.*
Homer v. *National Bank of Commerce, 140 Mo., 225.*
Lockwood v. *Beckwith, 6 Mich., 168.*
Mechanics' Bank v. *Stone, 115 Mich., 648.*
Fuller v. *Stieglitz, 27 Ohio State, 355.*

The indebtedness, therefore, of an insolvent debtor which matures after his assignment for the benefit of creditors, cannot be the subject matter of set-off against his assignee. (*Martin* v. *Kunz-*

muller, supra; Fera v. *Wickham, supra; Huse* v. *Ames, supra.*)

A set-off is enforceable against an assignee for the benefit of creditors only when it is a demand which became due from the assignor at or before the making of the assignment. (*Fera* v. *Wickham, supra.*)

If no right of set-off exists when an assignment by an insolvent debtor for the benefit of creditors is made, it cannot afterward arise in favor of one indebted to the insolvent estate who is also a creditor. If, therefore, there was among the assets transferred by such an assignment a demand against one who, at the time the assignment was made, held a demand against the assignor which had not then matured, he is not entitled to a set-off although his claim against the estate matures before that against him. (*Fera* v. *Wickham, supra.*)

Of course, a set-off is permitted where the debt owing to the insolvent is not due. (*Bradley* v. *Angel, 3 N. Y., 755; Jones* v. *Peinning, 85 Wis., 264; Stevens* v. *Schuchermann, 32 Mo. Appeals, 333; Jones* v. *Robinson, 26 Barb., 310; Yardley* v. *Clothier, 51 Fed. Rep., 506; Drake* v. *Rollo, 3 Biss., 273; Kentucky Flour Co., etc.,* v. *Mercantile National Bank, 90 Ky., 225.*) Otherwise expressed, a set-off will be allowed in equity on the application of the complainant, where the defendant is insolvent, although the debt of the complainant to the defendant is not due, but it will not be allowed if the debt of the defendant to the complainant is payable at a future day. (*Bradley* v. *Angel, supra; Lindsay* v. *Jackson, 2 Paige, 581; Chance* v. *Isaacs, 5 Paige, 592; Coster* v. *Griswold, 4 Edw. Ch., 364, 374; Hill* v. *Holbrook, 4 Id., 539.*) This distinction is explained as follows: *An assignee of an insolvent debtor "has no authority to waive the time of credit secured for the benefit of his*

assignor and pay a debt not due with credits or the avails of credits which are due to the assignor at the time of making the assignment, for to do so would tend to prejudice the creditors of the insolvent estate, but a debtor to such estate, whose debt was not due at the time of the making of such an assignment, has the authority to waive the time of credit which was secured for his own benefit and pay the same at once in money or by way of set-off of the amount due him from such estate."

Jones v. *Peinning, 85 Wis., 264, 267,*
per Cassoday, *J.*
Hughitt v. *Hayes, 136 N. Y., 163.*

Out of accord with these decisions, we find the case of *Nashville Trust Co.* v. *Bank* (*91 Tenn., 336, 354*), which holds that the insolvency of a party is a good ground of equitable set-off, even where the indebtedness on one side is not due, and that it makes no difference in which party's favor is the unmatured debt. It is said in this case that the supposed hardship or injustice resulting from the anticipation of the unmatured debt may and should be wholly obviated by discounting it or adding interest to the due debt for the unexpired term of the debt not due, and in this way equalize the interest. It must be observed, however, that the legal right in such a case is with the holder of the matured obligation and against the owner of the unmatured liability, and there is certainly as strong a natural equity that the whole of the estate of the insolvent should be distributed ratably among the creditors as that a part of the assets should be first set apart and appplied to compensate the particular debt of the complainant. Where the equities are as strong on one side as the other, the legal right must be left to prevail. (*Change* v. *Isaacs, 2 Edw. Ch., 348, 357.*)

The great weight of authority, as indicated by

the above cases, is with the principle contended for. Whether the decisions are placed upon the principle that the greater equity is with the assignee for the creditors and against the single claim, or whether the equities are considered equal as between the assignee and the claimant, and, in this situation, the maxim that equity follows the law is applied, nevertheless, they are all in accord in reaching the rule that an unmatured claim against an insolvent cannot be utilized as a set-off against a matured claim in favor of the insolvent.

The Referee practically admitted that if the case were to be decided by the authority of State decisions, the trustee's contention was well supported, and, as he seems to place reliance upon certain Federal authorities, it is desirable to consider them to determine whether they are out of harmony with those of the State courts.

Myer v. *Dickinson*, *107 Fed. Rep.*, *86*, is not authority for the Referee's decision. There is nothing in the case to indicate whether the notes held by the bank matured before the institution of the bankruptcy proceedings, the statement of facts in the case merely indicating that the notes in question were unmatured at the time the general assignment was made by the bankrupt under the State law preceding the institution of the bankruptcy proceedings. The Court practically recognized the law of set-off as administered in the courts of Pennsylvania. The statement at the end of the opinion that the bankruptcy proceedings having intervened "another and different rule of set-off applies," may refer to the maturity of the notes in the *interim* between the making of the general assignment and the institution of the bankruptcy proceedings.

In *Ex parte Howard National Bank*, *2 Lowell*, *487*, cited by the Referee as sustaining that portion of his opinion which holds that under Section 20

of the Act of 1867 such an offset as is sought to be secured by the bank in this case was upheld, Judge Lowell did not have this question before him. What he really decided was that the deposit in the bank should be set off against the aggregate amount of notes of the bankrupt, irrespective of any question of priority in the application of payments. In like manner in the case of *In re H. Petrie et al.*, 7 *N. B. R.*, *332*, cited by the Referee on the same point, the facts differed in the essential particular of maturity of the obligation to the bank. The draft in that case, which was offset against the deposit, became due a month before the institution of the proceedings in bankruptcy.

It is true that in the case of *In re Kalter*, *2 N. B. N.*, *264*, such an offset as is sought in this case was upheld on the ground that the provability of the debt is the criterion of its availability for the purposes of set-off. This decision was rendered by a Referee in the Eastern District of Pennsylvania, and the cases that he cited in support of his conclusion he expressly explains are without bearing upon the point.

In *Hough* v. *First National Bank of Ft. Wayne*, *4 Bissell*, *449*, the obligation of the bank had matured at the time it received the payment complained of.

In *Demmon and ano.* v. *The Boylston Bank*, *5 Cush.*, *194*, cited by the Referee in *In re Kalter*, *supra*, the note must have been due on the institution of the insolvency proceedings for the reason that it was dated January 3rd, 1848, and was due one month after its date, while the petition in insolvency was not filed until February 4th, 1848.

It is true that some unmatured obligations have been permitted to be offset against matured obligations under former bankrupt statutes, but we assert from a careful examination of the authorities that the only instances in which such application has been permitted by the Court were where

it was the debts owing *by* the bankrupts which were due at the time the petition was filed and the debts owing *to* the bankrupts did not mature until subsequent to that date. As already explained, the courts have held in such cases that the creditors of the bankrupts, upon the maturity of the obligations to them, might declare the debts owing *by* them to be due at that time and thus permit an offset of the character in question, and to this class of cases belongs *In re City Bank of Savings, Loan & Discount, 6 N. B. R., 71.* There the debt due to the creditor was payable at the time of the insolvency, and it was the amount owing by him to the bankrupt that became due subsequently. The courts permit offsets in such cases on the theory that the creditor chooses to declare his obligation to the bankrupt due and thereby the necessary mutuality is secured.

We believe that the reason our effort to secure judicial acquiescence in our contention has been so far unsuccessful is owing to the fact that we have been met with much *dicta* in reported cases and unconsidered reflections of text writers. The principal and most obvious example of this is the following statement of the text of Lowell on Bankruptcy:

> "Section 258. Banker and Customer.
>
> "Though bankers are bound to honor their customers' checks to the extent of his cash balance, without regard to his liability on running bills or notes, yet as soon as he becomes bankrupt there is a lien or right of set-off for those liabilities, whether they have matured or not."
>
> *Lowell on Bankruptcy, page 194.*

In support of this text there is cited the case of *Alsager* v. *Currie, 12 M. & W., 751,* decided in 1844 (7 Vict.), at a time when the English Bankrupt

Act was 6 George IV, Chapter 16; Section 50 of which, relating to set-off, was as follows:

> "L. And be it enacted, That where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side or the balance of such account, and no more, shall be claimed or paid on either side, respectively, *and every debt or demand hereby made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate;* provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

And in the very next section it is provided:

> "LI. And be it enacted, That any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever, which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note or other security, as if the same was payable presently, and received dividends equally with other creditors, etc."

It is to be observed that the above statute expressly declares that every provable debt shall be the subject of set-off, and had it been desired to make every provable debt the subject of set-off in the American Act, Congress would not have al-

iowed the law to be framed as it is at the present time. It is evident that the decisions rendered under a bankrupt act entitling every provable debt to be set-off are not applicable to an act which permits only mutual debts or mutual credits between the estate of the bankrupt and the creditor to be the subject of set-off.

Again, Lowell cites the case of *Jones* v. *Pienning*, *85 Wis., 264*, in support of the same text. That was a case where the bank made a voluntary assignment while holding notes of a depositor, and it was held that the latter was entitled to have the amount of his deposit set-off against the amount of the notes though they were not due at the time of the assignment. In passing upon the question raised in that case, the Supreme Court of Wisconsin said:

> "Undoubtedly the rights of the creditors and debtors of an insolvent assignor as to set-offs became fixed immediately upon the completion of the assignment, in analogy to the rule applicable to debtors and creditors in the cases of deceased insolvents (*Union National Bank* v. *Hicks*, *67 Wis., 192*). Accordingly, it has been held by this court that a bank cannot set-off against a deposit to the credit of an assignor for the benefit of creditors, a note held by it against him but not due at the time of the assignment (*Oatman* v. *Batavian Bank*, *77 Wis., 501; 20 Am. St. Rep., 136*). For the reasons for the rule see the opinion of Mr. Justice Orton in the case last cited. To the same effect is the decision of this court in *Kinsey* v. *Ring*, *83 Wis., 536;* and see, also, *Fera* v. *Wickham*, *135 N. Y., 223*.
>
> "The case at bar differs largely from that class of cases, and turns upon a different principle. Here it was the indebtedness of the insolvent debtor that was not due when the assignment was made, but a portion of the indebtedness from the plaintiffs to the assignee of the insolvent debtor. An assignee of such insolvent debtor has no author-

> ity to waive the time of credit secured for the sole benefit of his assignor and pay a debt not due to the assignor at the time of making the assignment, for to do so would be to prejudice the creditors of the insolvent estate; but a debtor to such estate whose debt was not due at the time of making such assignment has the authority to waive the time of credit which was secured for his own benefit, and pay the same at once in money or by way of set-off of the amount due him from such estate. The rule is firmly settled in other States, and has in effect been sustained by this court (*Lindsay* v. *Jackson, 2 Paige, 581; Smith* v. *Felton, 43 N. Y., 419; Smith* v. *Fox, 42 N. Y., 677; Rothschild* v. *Much, 115 N. Y., 1; Richards* v. *La Tourette, 119 N. Y., 54; McCagg* v. *Woodman, 28 Ill., 84.*" *Jones and ano.* v. *Pienning, 85 Wis., 264, 267.*

It will be seen from the foregoing that not only is the text unsupported in so far as it purports to be a decision of this point by the case cited, but, on the contrary, the doctrine is absolutely condemned by the Wisconsin court.

Since these cases cannot be reconciled with the opinion appealed from, it will be claimed that the Court of Appeals of New York has recognized a distinction between State and Federal rules of set-off, and that in the application of the bankrupt law there is not wanting any uniformity of decision. On the motion to affirm, made at the October Term, 1905, counsel for the appellee cited the then recent decision in the New York Court of Appeals of *Frank* v. *Mercantile National Bank, 182 N. Y., 264,* where the opinion was rendered by Chief Judge Cullen, who states expressly that:

> "If the defendant's right depended on the equitable rule of set-off as it obtains in this state, it is clear that the notes held by it, which had not matured at the time of

> the transfer of the title from the bankrupt to his assignee, could not be set off against the plaintiff's claim, *Fera v. Wickham* (*135 N. Y., 223*) is a conclusive authority to that effect, and so the respondent's counsel concedes."

The learned Court of Appeals, speaking by its chief judge, holds, however, that a different principle of set-off is required to be applied by the terms of the bankrupt law, and cites mainly those cases in the circuit and district courts which have already been examined in this memorandum in the discussion of the referee's opinion.

We had occasion, in the Circuit Court of Appeals, to discuss these decisions with the result that that court based its opinion upon the definition of the word "debt" contained in Section 1, Subdivision 11 of the Act, which it read into Section 68 providing for set-off. Upon the oral argument, one of the judges stated that the former decisions of this Court were based upon the law of 1867, which provided no definition for the term "debt," and so made applicable the ordinary equitable principles of set-off.

The Court of Appeals of New York has gone further, however, in this connection, and in the course of his opinion Chief Judge Cullen observes:

> "Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammon v. Kimball*, (*92 U. S., 362*), which arose under the Bankruptcy Law of 1867, the provisions of which so far as they deal with the questions involved in this case are substantially the same as the present law."

Scammon *v.* Kimball was an action by a policyholder against the assignee in bankruptcy of a fire insurance company and the complainant therein was allowed to set off the sum owing him on cer-

tain policies against the claim of the assignee for money on deposit with him as banker.

It is not in the report of Scammon *v.* Kimball that the learned Chief Judge finds authority for his assertion that the decision indicates an opinion by this Court on the same question that is involved herein. To quote his own language:

> "The report of the case does not show when the claim on the insurance policies matured, but that fact appears from opinions in two subsequent cases decided by the same court (*Carr v. Hamilton, 129 U. S., 249 (252); Scott* v. *Armstrong, 146 id., 499*), in which it is stated that the claim for fire losses in the Scammon case did not mature until after the *insolvency* of the insurance company."

The question before the Court is not whether a set-off of the character sought is permissible when the debt which is to be set-off was not matured at the time of the *insolvency;* the question for determination is whether a set-off is permitted when the claim which is to be set off was not matured when *the trustee in bankruptcy* took title to the assets of the insolvent.

Though the Insurance Company in *Scammon* v. *Kimball* was insolvent before the maturity of the obligation sought to be set-off, yet there is no statement in the report nor in the two subsequently decided cases referred to that would indicate that the obligation had not matured at *the time of the filing of the petition in bankruptcy,* and when recourse is had to the records of this court for the facts, they reveal a case which makes the decision utterly inapplicable to the appeal *sub judice.*

The printed record, exclusive of the briefs of counsel, in *Scammon* v. *Kimball,* is found in Vol. 5, October Term, 1875, page 3960 (Transcript of Records, 1875, on file in the office of the Supreme

Court, U. S.). On page 3966 of these records the answer to the original bill of the complainant Scammon contains the following uncontroverted statement:

> "That the petition to declare said Company bankrupt was filed in the District Court of the United States for the Northern District of Illinois by one Franklin McVeagh on the *20th day of January, A. D. 1872;* that said Company was on said petition adjudicated bankrupt by decree of said District Court on the 27th day of January, A. D. 1872."

Among the stipulated facts in the case we find, page 3969:

> "That at the time of the fire on the 8th and [illegible] days of October, A. D., 1871, J. Young Scammon (the complainant) held policies or contracts of insurance of the Mutual Insurance Company, upon which losses were then sustained to the amount of Forty-five Thousand Fifteen 33/100 dollars ($45,015.33), and that *that sum became due thereupon to said Scammon from said Company sixty days after notice, on proofs once* (the brief for appellant has '*at once*' which was doubtless the fact) made to said Company under such policies," etc.

It is therefore obvious that at the time of filing the petition in bankruptcy, *viz.*, the 20th day of January, 1872, three months and eleven days after the fire, all the conditions required to mature the obligation upon the policies had been performed, and the amount thereof was then due and payable, so that the equity jurisdiction exercised by the Court was the ancient and ordinary set-off of debts that were both due and payable before the intervention of the bankruptcy proceedings. The question whether the deposit held by the complainant could have been used as a set-off against the claim

of the trustee in bankruptcy in case the conditions required to mature the policies had not been performed at the time of the institution of the bankruptcy proceedings was, therefore, not before the court and certainly not decided.

We have never asserted that it is not permitted to a solvent creditor against whom exists a present claim to set-off against it an unmatured claim against his insolvent debtor, where the rights of the parties only are involved. This is the principle adverted to by the Judges in the *dicta* of their opinions in the cases referred to by Chief Judge Cullen. But when insolvency of one of the debtors and proceedings for the benefit of all his creditors intervene between the respective dates of maturity of the two debts, then there is, or there is not, a right of equitable set-off of the debts according to which of the two debts it is that matures before the bankruptcy.

In *Scott* v. *Armstrong* the question to be determined was whether a creditor with a present claim against an insolvent could precipitate the date of maturity of the claim the insolvent had against him. That principle is not involved in the appeal at bar. It constitutes an entirely different case.

The distinction is made obvious by the following from the opinion of Mr. Justice Peckham in the Court of Appeals of New York:

> "But where a debt is due from the *insolvent, and it is a debt from the other party to the insolvent which is not due,* the Court does not change the contract against the will of the parties, but it simply takes the waiver of the debtor whose debt is not yet due, and only by his consent and at his request treats it as due at once."
>
> *Richards* v. *LaTourette, 119 N. Y., 54, 59.*

And again:

> "It has been frequently held that, as to the right of set-off in equity, the fact that the debt owing to the insolvent is not due when he makes an assignment is entirely immaterial. The setting it up as off-set is a waiver by the debtor of any defense upon the ground that the debt is not due, and such waiver of right to demand the full time in which to pay his debt can lawfully and properly be made by *the debtor.*"

Opinion of the court per Peckham, *J.*, in *Rothschild* v. *Mack, 115 N. Y., 1, 8.*

We submit, with all respect, that Chief Judge Cullen was mistaken in the statement—

> "That the law of equitable set-off in the Supreme Court of the United States seems to be different from that which prevails with us."

Schuler v. *Israel* (*120 U. S., 506*), which he cites to substantiate his claim of a conflict of authority, states no different rule than that contained in *Fera* v. *Wickham et al., 135 N. Y., 223,* where on page 227 of the opinion Judge Gray says:

> "The natural equity in offsetting cross demands, which had its rise in the rule of the civil law, was soon adopted by the Court of Chancery in cases where, from the situation of the parties, cross actions at law were inadequate. Hence, if one of the parties should become insolvent, the insolvency was recognized as presenting a case for equitable interference. *But the rule was limited in its application to cases where the equitable rights of others were not interfered with.*"

And Judge Gray, in disposing of the issue actually before the court in *Fera* v. *Wickham,* stated the equitable doctrine in the following manner:

> "The question here is whether the plaintiff has an equitable right to an offset of his de-

> mand against the insolvent estate which had not matured at the time of the assignment, but which did subsequently mature before the demand held by the assignee againt him matured. In the solution of this question we might find some embarrassment in endeavoring to reconcile expressions of opinion by the judges in earlier cases, and after a very careful consideration I am disposed to hold that by an assignment in trust for the assignor's creditors, what natural equities previously existed become suspended by an intervention of the rights of other creditors."
>
> *Fera* v. *Wickham et al., 135 N. Y., 226, 227.*

The apparent misapprehension in the mind of Chief Judge Cullen that there exists any conflict between the decisions of this court and the Court of Appeals on the subject of equitable set-off seems to issue from the case of Carr *v.* Hamilton, in which this court in treating of the present value of life insurance policies as property and objects of set-off established a different rule from that which had been held by the Court of Appeals of the State of New York. This view did not arise from any difference of opinion as to the law involved with regard to equitable set-off, but was predicated upon a difference in the manner in which the respective courts regarded the cash surrender value of a policy.

In *Carr* v. *Hamilton,* the appellant supported his contention by the case of *Newcomb* v. *Almy, 96 N. Y., 308.* The following excerpt from the opinion of this Court, delivered by Mr. Justice Bradley, clears up the difficulty experienced by Chief Judge Cullen in contrasting the decisions:

> "That case (*Newcomb v. Almy*) was almost parallel with the present one, and the claim of setoff was disallowed. The suit was brought by the receiver of an insolvent

> life insurance company against the holder of an endowment policy issued by the company to recover the amount of a promissory note. The defendant, as in this case, sought to set off the value of his policy against the note. The policy was not yet due and in case the defendant died before it became due the amount was payable to his wife. The court assumed that the interests of the assured and his wife were so involved together that they could not be separated; and that it did not yet appear who would be entitled to the insurance,—not adverting to the fact that the interests of all the parties became fixed by the insolvency of the company, and must be computed as expectancies reduced to present values. It is true, the court does, in the next sentence, concede that the policy had a reserve value,—but asks, 'To whom was that value payable?' The plain answer was at hand, that the reserve value of each person's interest was payable to him or her. We cannot but think that if the true character of the interests in question had been brought to the attention of that learned court, it would have come to a different conclusion from that which was reached."

In like manner, if the true character of the principle of equitable set-off had been brought to the attention of the learned Court of Appeals, in the language of Mr. Justice Bradley, "it would have come to a different conclusion than that which was reached" in its recent decision. Neither the provisions of the Bankrupt Law nor the application of the doctrine of equitable set-off in the federal courts demanded or justified any variance from the principle of equitable set-off so clearly expressed in the New York cases and overwhelmingly sustained by almost every other jurisdiction in this country.

We have not been able to find a single federal authority which indicates in the slightest degree

a departure from the doctrine for which we have contended in this memorandum, and we, therefore, assert that the cases cited above establish the proposition we made at the outset, that an unmatured claim against the bankrupt cannot be used as an offset to a matured claim in favor of the bankrupt and against the claimant. This equitable doctrine should find application in bankruptcy cases because it is the only doctrine applicable to such cases. No other principle of set-off is known to courts of equity, and, according to the decisions of this court, under the Act of 1867, which are the only cases in point, the set-off of courts of bankruptcy is equitable set-off and nothing more.

POINT II.

The definition of the word "debt," in Section I, Subdivision 11, of the Bankrupt Act has no application to the phrase "mutual debts or mutual credits" when used in Section 68.

The learned Circuit Court of Appeals put its affirmance of the referee's decision on the ground that the right of set-off in bankruptcy was, by subdivision 11 of section I of the present act, enlarged and extended so that any counter debts or claims might be set-off in bankruptcy, if each of them could be proved in bankruptcy against the debtors, respectively. If correct, this ruling practically creates a new theory of set-off, which is quite at variance with any principle administered by courts of law or equity. It sweeps away the decisions of this court, under the act of 1867, and nullifies the equitable doctrine founded upon substantial justice.

If Congress had intended to enlarge the doctrine of set-off so as to enable the party to make a set-off in cases where the principles of legal and equitable set-off did not previously authorize it, we submit that appropriate words, evidencing such an intent, would have found their way into section 68 of the law, which would have been made to conform by apt expression to the English Statute of 6 George IV, c. 16, which expressly declares that "every debt or demand hereby made provable against the estate of the bankrupt may also be set-off in manner aforesaid against such estate" (sec. 50).

Even as a matter of mere technical etymology, the definition of the word debt in subdivision 11 of section I of the act can have no application to the phrase "mutual debts and mutual credits" in section 68. The inherent and necessary connotation of the word "mutual" is dual or plural. A "mutual debt" would be unthinkable and meaningless. The definition of the word "debt" is, therefore, useless in the interpretation of the phrase "mutual debts or mutual credits." The title to section I of the act declares that it is a definition, not merely of "words," but "words and phrases." There are in the section definitions of many phrases. If it had been intended to define the phrase "mutual debts or mutual credits" in a fashion contrary to the rulings of this Court, such a definition would have been inserted in section 68. Thus, although section I, subdivision 9, provides a definition for the word "creditor," the framers of the act deemed it also necessary to define (in subdivision 23) the phrase "secured creditor."

Again, section 63-a (1), which provides what claims are provable in bankruptcy, makes express provision for a method of proving unmatured obligations, by taking therefrom a rebate of interest, and if it were not for the words "whether then payable or not" in that section, it would have been questionable whether an unmatured obligation

against the bankrupt could have been proved, in view of the preceding language in the same section, to wit, "absolutely owing at the time of the filing of the petition against him." Therefore, in order to provide for the proving of an unmatured debt, Congress, for the purpose of making it a provable debt, rebated interest and, thereby, for the purposes of proof only, made it a matured one. If it had been the intention of Congress to provide that unmatured debts might be set-off, a similar provision would have been inserted in the set-off section to that inserted in the section relating to the proof of claims.

Our contention, under this point, in short, amounts to this: By the decisions of this Court, under the former Bankrupt Law, the phrase "mutual debts or mutual credits" has been defined. That definition involves an application of the general equitable doctrine of set-off. Had it been the intention of Congress to change the definition, such change would have been indicated by appropriate language contained in, or directly pertaining to, the set-off section itself.

Libby v. *Hopkins, supra;*
Gray v. *Rollo, supra;*
Sawyer v. *Hoag, supra;*
Western Tie & Timber Co. v. *Brown, 196 U. S., 502.*

POINT III.

The decrees of the Circuit Court of Appeals and District Court should be reversed and the case remanded to the District Court, with directions to disallow the proof of claim, unless

the claimant shall return to the trustee in bankruptcy the sum of $6,232.96, the amount of the balance on deposit to the credit of the bankrupt at the time of the filing of the petition in bankruptcy.

Respectfully submitted,

MARTIN CONBOY,

Counsel for Appellee.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 54

Office Supreme Court U. S.
FILED
OCT 4 1905
JAMES H. McKENNEY,
Clerk.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,
Bankrupt.

MARTIN CONBOY, Trustee,
Appellant,

against

THE FIRST NATIONAL BANK OF JERSEY CITY,
Claimant-Appellee.

BRIEF FOR APPELLEE ON MOTION.

WILLIAM G. WILSON,
Of Counsel for Appellee.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

UNITED STATES SUPREME COURT.

In the Matter

of

Phillip Semmer Glass Company, Limited,

Bankrupt.

Martin Condoy, Trustee,

Appellant,

vs.

First National Bank of Jersey City,

Respondent.

BRIEF FOR APPELLEE ON MOTION.

This is a motion to dismiss or affirm, submitted under Rule Six of this Court.

The appeal herein by the Trustee of the above named bankrupt was allowed by a justice of this Court upon the certificate of such justice "that in his opinion the determination of the question or questions involved in the allowance or rejection of the claim of the First National Bank of Jersey City is essential to a uniform construction of the Bankrupt Law throughout the United States." This certificate was "made conformably to act of Congress of July 1, 1898, § 25-6, paragraph 2."

Statement.

At the time of the filing of the petition in bankruptcy against the Phillip Semmer Plate Glass Company, Limited, that company, then and theretofore a dealer with the First National Bank of Jersey City, had on deposit with the Bank a balance to its credit of $6,232.96. At the same time the Bank held promissory notes to a larger amount on which the Glass Company was liable as indorser, which had been discounted by the Bank for account of the Glass Company but had not then matured.

The Bank applied this sum in its hands to the payment of these notes *pro tanto* and proved its claim against the bankrupt for the balance.

The Trustee, in September, 1903, petitioned for a reconsideration of the claim, and after proofs taken and hearing had, the Referee made an order, of May 13, 1904, allowing the claim, and affirming the right to set off, which the trustee had contested.

This allowance was affirmed by order of the District Court, of June 7, 1904, after hearing, upon the Trustee's petition of review.

From the District Court's order of affirmance the Trustee appealed to the Circuit Court of Appeals. The appeal was fully argued, and, upon affirmance of the District Court, an opinion was delivered, stating the grounds of the decision and affirming the right of set off.

Upon this decision, the order or decree of the Circuit Court of Appeals, allowing the claim of the Bank, was entered January 23, 1905.

Subsequently the Trustee made a motion in the Circuit Court of Appeals to recall the mandate issued to the District Court upon the above affirmance, and to vacate the order therefor. This motion was denied by order of April 25, 1905.

Thereafter the Trustee petitioned the Circuit Court of Appeals for a re-hearing of the appeal in that Court, and the application was denied by order of May 24, 1905.

The present appeal, which was allowed May 27, 1905, is from these three orders of the Circuit Court of Appeals, viz.—

1. Order, January 23, 1905, affirming allowance of claim.
2. Order, April 25, 1905, denying motion to recall mandate.
3. Order, May 24, 1905, denying petition for re-hearing.

POINT FIRST. The motion to dismiss should be granted, as there is no jurisdiction to entertain this appeal.

The only authority for the present appeal is found in the following provisions:—

Bankrupt Law, Section 25:—

"*b.* From any final decision of a court of appeals, *allowing or rejecting a claim* under this act, an appeal may be had under such rules and *within such time* as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

* * * * * *

"2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

General Orders in Bankruptcy, XXXVI:—

"2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals * * * shall be taken *within thirty days* after the judgment or decree, and shall be allowed by a judge of the court appealed from or by a Justice of the Supreme Court of the United States."

It is obvious that the *only* appeal which is permitted to be taken to the Supreme Court herein, under these provisions, is an appeal from the order or decree of the circuit court of appeals "allowing or rejecting a claim," and that such appeal must be taken "within thirty days" after such order or decree.

The order or decree of the circuit court of appeals allowing the present claim was entered January 23, 1905.

The present appeal was allowed May 27, 1905.

Therefore the present appeal was taken more three months after the expiration of the time allowed.

The appeal from the order of the Circuit Court of Appeals denying the motion to recall its mandate, would be under the same ban,—as that order was made April 25, 1905, more than thirty days prior to the appeal of May 27, 1905,—if such an appeal could be taken at all. But there is no authority for such an appeal in any case.

The appeal from the order of the Circuit Court of Appeals denying the petition for a rehearing would not lie in any case. Such motion is addressed wholly to the discretion of the court, and its purpose is only to afford the court to which it is addressed an opportunity to correct its own errors. It is designed to obviate the necessity for an appeal; not to lay the foundation for an appeal.

The allowance of the appeal and the certificate of the Justice of this Court cannot alter the situation. The certificate merely declares that there is ground for an appeal in the nature of the questions involved. But its effect is expressly subject by the terms of the statute to the provision that the appeal founded on such certificate must be had, or taken, "within such time as may be prescribed by the Supreme Court of the United States," and this Court has limited that time to thirty days. And the formal allowance of the appeal is no adjudication that the appeal is taken in time. Whether it was or was not taken in time is a question for this Court. It is not to be imagined that any Justice of the Court in the mere allowance of an appeal is assuming to exercise or has any power to exercise any jurisdiction to prejudge this question.

The limitation of time fixed by General Orders under the authority of the statute has the same effect as if that time had been fixed in the first instance by the statute itself. The purpose of this limitation of thirty days is patent enough; it is intended to prevent the tying up of bankrupt estates by prolonged litigations over disputed claims. The importance of such limitation is well illustrated in the present instance

where the litigation over the claim of this Bank, initiated in September, 1903, and decided by the Circuit Court of Appeals in January, 1905, still awaits, through this appeal, its final determination.

POINT SECOND. The motion to affirm should be granted, as no question is presented upon this appeal which is not already fully settled in the appellee's favor.

It was held by this Court in *N. Y. County Bank v. Massey*, 192 U. S., 138, that the holding by a bank on the one hand of monies deposited by the bankrupt and subject to check, and on the other hand of promissory notes upon which the bankrupt was liable constituted a case of mutual debts or mutual credits which were the proper subject of set off. "Section 68*a* of the bankruptcy act of 1898 is almost a literal reproduction of section 20 of the act of 1867. So far as we have been able to discover the *holdings were uniform* under that act that set off should be allowed as between a bank and a depositor becoming bankrupt." "There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a perpetual transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

The only particular in which the appellant seeks to differentiate the present case from *N. Y. County Bank v. Massey*, is in the fact that the notes held by the First National Bank had not matured at the time when the petition in bankruptcy was filed.

This presents only the additional question whether the claim of the First National Bank against the Phillip Semmer Glass Company, upon notes which had not matured at the date of bankruptcy was within the contemplation of section 68 of the Bankrupt Law.

That section reads :—

"*a.* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"*b.* A set-off or counter-claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not *provable* against the estate."

Clearly, then, debts which are "provable" are proper subject of set off.

Debts provable against the estate are thus defined by section 63 of the Bankrupt Law :—

"(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, *whether then payable or not*, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were then not payable and did not bear interest;" "(4) founded upon an open account, or upon a contract express or implied."

The claim of the First National Bank of Jersey City against this bankrupt was thus provable by the express terms of the act, and would be discharged by the discharge of the bankrupt.

Upon this point there is no lack of uniformity of decision. In *Moch v. Market Street National Bank*, 107 Fed. Rep., 897, it is said of the liability of a bankrupt endorser of commercial paper which did not become absolute until after the filing of the petition in bankruptcy, that it "is within the very words of this fourth subdivision", citing *Martin v. Cole*, 104 U. S. 30, that it is an "express contract" and that "its terms are certain, fixed, and definite."

The Circuit Court of Appeals in its opinion in the present case says that the argument of the Trustee, the appellant, "entirely disregards section I subdivision 11 of the Bankruptcy Act, which provides that the word 'debt' when used in said act 'shall include any debt, demand, or claim provable in bankruptcy.' That meaning must be given to the word when used in the set-off Section. * * * To determine therefore whether the holder of a claim is entitled to the benefit of section 68 it is necessarily only to enquire whether his clain is one provable in bankruptcy.

We concur with the Court of Appeals for the Third Circuit (*Moch v. Market St. Nat. Bank*, 107 F. R. 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy."

The uniformity of decision upon this point is recognized in *Frank v. Mercantile National Bank*, 182 N. Y. 264, 267, where it is said by *Cullen*, C. J.: "The argument is that as unmatured claims against the bankrupt are provable against his estate, they necessarily are the subject of set-off under the provisions of section 68. We think that this position is well taken, but we shall refrain from entering into any discussion of the question, as the proposition seemed to be *settled* by decisions of the Federal Courts. The *uniform current of authority* of the District and Circuit Courts of the United States is to that effect and the law is so stated in the text books on bankruptcy. (*Re City Bank of Savings*, Fed. Cas. No. 2,742; *Ex parte Howard Nat. Bank*, Fed. Cas. No. 6,764; *Re Kalter*, 2 N. B. N. R. 264; *Re Little*, 6 Am. B. R. 681; *Myers v. Dickenson*, 5 Am. B. R. 595; *Union Nat. Bank v. McKay*, 2 N. B. N. R. 913; *Re Phillip Semmer Glass Co.* 11 Am. B. R. 665; Collier on Bankruptcy [4th ed.], p. 498; Brandenburg on Bankruptcy, § 1131.) Moreover the very point seems to have been decided by the Supreme Court of the United States in *Scammar v. Kimball* (92 U. S. 362), which arose under the Bankrupt Law of 1867, the provisions of which, so far as they deal with the questions involved in this case, are substantially the same as the present law. (*N. Y. County Bank v. Massey*, 192 U. S. 138.) That was an action against the assignee in bankruptcy of a fire insurance company. The complainant was allowed to set off the sums owing him on certain policies as against a claim of the assignee for money on deposit with the complainant as a banker. The report of the case does not show when the claim on the insurance policies matured, but that fact appears from the opinions in two subsequent cases decided by the same court. (*Carr v. Hamilton*, 129 U. S. 249; *Scott v. Armstrong*, 146 *id.* 499), in which it is stated that the claim for fire losses in the *Scammar* case did not mature until after the insolvency of the insurance company."

The decision in *Western Tie and Timber Co. v. Brown*, 196 U. S. 502, has absolutely no bearing whatever upon the question presented by this appeal.

In that case Harrison, the bankrupt, and certain laborers, all in the employ and under the pay of the Tie Company, were engaged in the work of removing timber from the lands of the Company and converting it into ties, which the Company sold.

Harrison established stores in which he furnished groceries and other supplies to the laborers. The Company deducted periodically from the earnings of each laborer the amount due from the laborer to Harrison for such supplies and paid it over to Harrison, paying the balance of such earnings directly to the laborer.

During the two months prior to the bankruptcy the Company deducted, as before, the amounts due by laborers to Harrison for such supplies from their total earnings, but refused to pay these amounts over to Harrison, and claimed to apply them on account of Harrison's debt to the Company.

It was held that the money so deducted represented the indebtedness of the laborers to Harrison, that as to such deductions the Company stood to Harrison in the relation of trustee, and was under obligation to remit the money to him, regardless of any debt he might owe to the Company "and, therefore, the case was not one of mutual credits and debts."

That is to say, the Company's possession of money belonging to Harrison, acquired by Harrison's consent for the sole and specific purpose of transmitting it to Harrison in payment of the laborers' debts to Harrison, did not give the Company any legal right, without Harrison's consent, to appropriate the money to its own use and apply it upon Harrison's debt to the Company. And it is pointed out that if this had been done *with* Harrison's consent, while the Company knew Harrison to be insolvent, it would have constituted an unlawful preference.

This decision is simply an application of the fundamental principle that set-off is only available where the debts and credits are *mutual*, that is between the same parties; and that a debt of C to A is not available as a set-off to a debt of A to B. It has nothing to do with the proposition that debts which

have not matured are the subject of proof and off-set under the Bankrupt Law.

POINT THIRD. The appellee should be awarded such redress as it is in the power of this Court to grant, in view of the delay and expense to which it has been exposed.

The claim has been in litigation for two years. It has been upheld successively by the Referee, the District Court, and the Circuit Court of Appeals; and in the latter court there have been, in effect, two further affirmances, one on motion to recall the mandate, and one on petition for rehearing.

Then, after the time for appeal had expired the appellant ignoring that fact and assuming a diversity of decisions which does not exist, has procured the allowance of an appeal to this Court, presenting no question which is open to dispute or is not already well settled.

It is obvious that appellee can receive no compensation from the estate of the bankrupt for all its expenses and loss of interest. If this litigation had been promoted by a private suitor, security would have been exacted. The Trustee has taken advantage of his official position to prosecute these appeals without security, other than that afforded by his official bond.

The trustee in bankruptcy is trustee for all the creditors. And while it is his duty to object to the proof of claims which are not lawfully allowable, he is not ordinarily justified in doing more than securing due and full consideration of the questions presented and the determination of the bankruptcy court thereon. That determination affords the rule for his guidance and protection, and establishes his duty to the creditor.

The general rule is that if a trustee goes further than this, and contests the rights of his *cestui que trust* after they have been judicially established, by the court of which he is an officer, he does so at his peril.

It is respectfully submitted that this is a proper case for the exercise of the power of this Court to award damages for delay.

As was said in *Whitney v. Cook*, 99 U. S., 607, "Parties should not be subjected to the delay of proceedings for review in this court without reasonable cause, and our power to make compensation for the loss occasioned by an unwarranted delay ought not to be overlooked."

WILLIAM G. WILSON,
Of counsel.

FILE COPY.

OCT 4 1905

JAMES H. McKENNEY,
Cl

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]54

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,
Bankrupt.

MARTIN CONBOY, Trustee,
Appellant,

against

THE FIRST NATIONAL BANK OF JERSEY CITY,
Claimant-Respondent.

PAPERS ON MOTION TO DISMISS OR AFFIRM.

WILLIAM G. WILSON,
Of Counsel for Respondent.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

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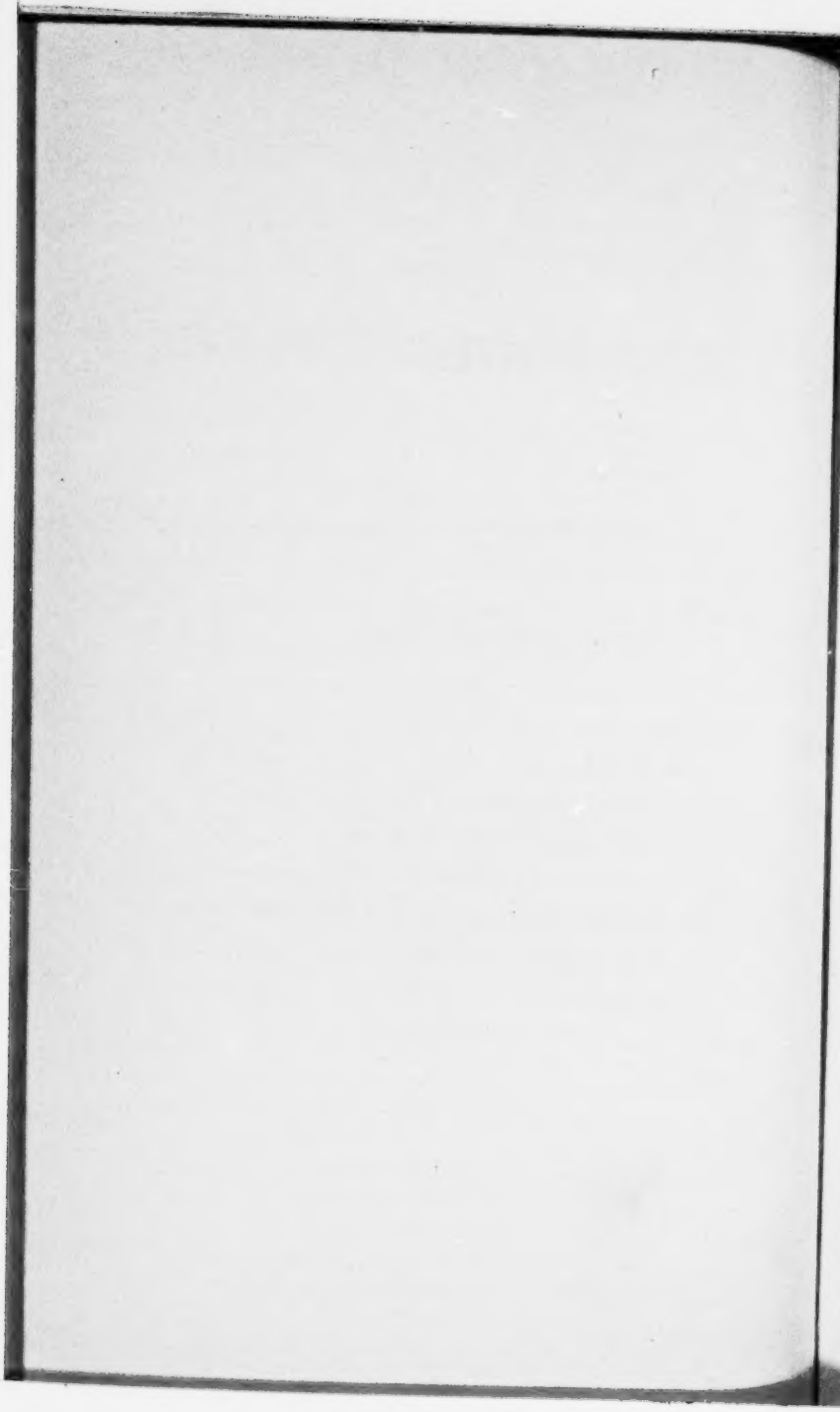

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1905. No. 309.

In the Matter

of

Phillip Semmer Glass Company, Ltd.,
Bankrupt.

Martin Conboy, Trustee,
Appellant,

vs.

First National Bank of Jersey City,
Claimant-Appellee.

And now comes the First National Bank of Jersey City, claimant-appellee herein, and moves this Court to dismiss the appeal of Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, from the orders and decrees of the Circuit Court of Appeals enumerated in his petition of appeal to this Court, upon the ground that this Court has no jurisdiction to entertain such appeal, for the following reasons: (1) As to the order or decree of January 23, 1905; that the appeal therefrom purports to be taken and is only allow-

able under Section 25*b* of the Bankruptcy Act of July 1, 1898, and under the General Orders in Bankruptcy XXXVI, is required to be taken within thirty days after the judgment or order appealed from, whereas such appeal herein was not taken until more than four months thereafter; (2) As to the order or decree of April 25, 1905; that the appeal therefrom likewise purports to be taken under the same provisions of the Bankrupt Act aforesaid; that said order or decree merely denied a motion of the appellant to recall the mandate theretofore issued upon the original decision of the Circuit Court of Appeals, and afforded no new basis of appeal, and was not in itself appealable; and that if any appeal did lie therefrom it was under the said terms of said General Orders in Bankruptcy required to be taken within thirty days after the judgment or order appealed from, whereas such appeal herein was not taken until more than three months thereafter; (3) As to the order or decree of May 24, 1905; that the same merely denied the petition and motion of the appellant for a rehearing of the original appeal to the Circuit Court of Appeals, four months after the decision of such appeal, and such petition and motion were addressed solely to the discretion of that Court, and the denial of the same is not subject to review by appeal; (4) As to all of said appeals; that their single and sole purpose is to bring before this Court for review the final decision of said Circuit Court of Appeals allowing the claim of this respondent after the time limit for an appeal therefrom had expired. And said claimant-appellee likewise moves this Court to affirm said orders and decrees, so far as the same may be appealable to this Court, on the ground that no question is presented thereby for review which is not already fully settled by the decisions of this and other courts in conformity with the decision of said Circuit Court of Appeals herein.

Dated, New York, September 23, 1905.

WILLIAM G. WILSON,
Of counsel for First National Bank of Jersey City, claimant-appellee.

IN THE

Supreme Court of the United States.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.

MARTIN CONBOY, Trustee, Appellant,

VERSUS

FIRST NATIONAL BANK OF JERSEY CITY, Respondent.

Please take notice that on the 23d day of October, 1905, a motion will be submitted to the Supreme Court of the United States, at the opening of the Court on that day, upon the record and proceedings in the case, to dismiss the appeal herein of Martin Conboy, Trustee, from the orders and decrees of the Circuit Court of Appeals for the Second Circuit, and to affirm said orders and decrees.

Dated New York, September 23, 1905.

WILLIAM G. WILSON,
Of Counsel for Respondent.

To FRANK A. CLARY, ESQ.,
Of Counsel for Appellant.

Proof of Claim.

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

THE PHILIP SEMMER GLASS COMPANY, LIMITED,

Bankrupt.

At Jersey City, in the District of New Jersey, on the day of June, 1903, came George W. Conklin, and made oath and says: That he resides at Hackensack, in the State of New Jersey, and that he is the cashier of the first National Bank of New Jersey, a corporation organized under the laws of the United States and carrying on business as a national banking association at Jersey City, Hudson County, New Jersey, and that he is duly authorized to make this proof. That the above named Philip Semmer Glass Company, Limited, the corporation against which a petition for adjudication of bankruptcy has been filed, was, at and before the filing of said petition, and still is, justly and truly indebted to said bank in the sum of nine thousand and eighty 03-100 ($9,080.03) dollars, with interest; that the consideration of the said debt is as follows:

That at the dates specified in the annexed schedule, marked "A," and made part of this proof, the said bank, in the usual course of its business, at the request of said bankrupt, discounted and paid to or placed to the credit of the said bankrupt the proceeds of promissory notes, made by the makers named, and for the amounts specified in the said schedule, all of which were duly endorsed by said bankrupt and delivered so endorsed, before maturity and for value, to the said bank, which is now the lawful owner and holder thereof; that no part of said notes has been paid, except

the sum of nineteen 28–100 ($19.28) dollars, which has been credited on account of the note of G. W. Wacker, leaving a balance due on said note of $250.02, and the total amount of said notes $9,060.94; copies of said notes are hereto annexed; that at the dates of maturity of such of said notes as have matured, said dates being the due dates specified in said schedule, the said matured notes were duly presented for payment, and payment duly demanded, but was refused, and thereupon the said notes were duly protested for non-payment, and due notice thereof was given to said bankrupt, at an expense for protest fees as stated in said schedule, amounting to the sum of nineteen 09–100 ($19.09) dollars, making a total indebtedness of nine thousand eighty 03–100 ($9,080.03) dollars; that there are no counterclaims or offsets to the same; and that the said bank has not, nor has any person by its order, or to the knowledge or belief of this deponent, for its use, had or received any manner of security for said debt whatever, except that judgment has been recovered in the City Court of New York in favor of the said bank against F. C. Lamonte, named in said schedule, upon his note therein specified, and execution has been issued upon said judgment, but has not been returned.

G. W. Conklin,
Cashier of First National Bank of Jersey City.

(Seal)

Subscribed and sworn to before me this 11th day of June, 1903.

Raymond Dawson,
Notary Public of N. J.

(Seal)

Schedule A.

Maker.	Date. 1903.	Time.	Due. 1903.	Amount.	Protest Fees.
H. C. Browning...	Jan. 3	4 mo.	May 3	$601.17	$1.50
G. G. Wacker	Jan. 10	3 "	Apr. 10	269.30	1.30
H. C. Browning...	Jan. 9	4 "	May 9	601.17	1.50
F. C. Lamonte....	Jan. 12	3 "	Apr. 12	200.00	1.25
W. Stabler	Jan. 12	" "	Apr. 12	349.00	1.50
Potts & Partridge.	Jan. 21	4 "	May 21	483.10	1.50
H. C. Browning...	Feb. 5	" "	June 5	384.74	1.50
Z. K. Berlin.....	Jan. 24	" "	May 24	493.65	1.50
K. C. Brown.....	Feb. 6	" "	June 6	597.37	1.50
W. C. Hunter.....	Feb. 9	" "	June 9	425.00	1.50
Z. K. Berlin.....	Feb. 13	" "	June 13	498.93	
G. E. Orcutt.....	Feb. 17	" "	June 17	350.00	
K. C. Brown	Feb. 16	" "	June 16	651.39	
Z. K. Berlin.....	Feb. 20	3 "	May 20	323.60	1.50
W. C. Hunter	Feb. 20	4 "	June 20	425.00	
Peter Wagner.....	Feb. 18	" "	June 18	489.20	
W. Stabler	Feb. 27	3 "	May 27	735.88	1.50
P. Wagner	Mch. 6	4 "	July 6	283.28	
Potts & Partridge.	Mch. 4	" "	July 4	468.34	
Geo. H. Payne....	Mch. 9	" "	June 9	450.00	.54
				$9,080.12	$19.09

G. W. Conklin,
Cashier of First National Bank of Jersey City.

Petition by Trustee for Reconsideration.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	In Bankruptcy.

TO MACGRANE COXE, ESQ., Referee in Bankruptcy:

Your petitioner respectfully shows that he is the Trustee of the above-named bankrupt; that the proof of debt of the First National Bank of Jersey City, claiming to be a creditor of the said Phillip Semmer Glass Company, Limited, was filed herein on the 12th day of June, 1903.

That the said claim should not have been allowed for the following reasons:

1. Because, according to the proof of claim filed by said First National Bank of Jersey City, and verified by its cashier, George W. Conklin, on the 11th day of June, 1903, the said bank claimed upon certain notes drawn by other parties and endorsed by the said bankrupt, which said notes at the time of the filing of the said proof of claim had not yet become due, and the liability of the bankrupt thereon had not at the time of said filing been determined or fixed.

2. Because the said bank, according to the record which it made in the pass-book showing the account of said bankrupt with it, admitted that on the 21st day of March, 1903, there was on deposit with it the sum of $6,232.96, which said sum is not accounted for in said proof of claim, but, your petitioner

is informed and believes that the said bank has attempted to offset against the amount alleged to be due to it on account of discounted paper not matured at the date of the said bankruptcy the amount of the said deposit; and your petitioner objects to such action on the part of the bank for the reason that if permitted it would enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, said bank having reasonable cause to believe that at the time said offset is claimed to have been effected a preference would be secured, in violation of the provisions of the bankruptcy statute.

3. Your petitioner further says that since the making of the said record admitting the existence of a balance in favor of the said Phillip Semmer Glass Company, Limited, on the 21st day of March, 1903, said bank, so your petitioner is informed and believes, had attempted to offset and counter-claim amounts due upon discounted paper upon which the name of the bankrupt appeared as indorser, and which said paper had not matured at the time of the filing of the petition in bankruptcy against the said Phillip Semmer Glass Company, Limited, and your petitioner objects that the said bank could not legally offset and counterclaim amounts of paper in its possession not yet matured against amounts of deposit then in its possession belonging to the said bankrupt or to the receiver of the said bankrupt upon his appointment.

4. Your petitioner further says that on the various dates within the period of four months prior to the filing of the said petition in bankruptcy, said bank received various amounts upon deposit from said bankrupt, which said amounts the said bank, so your petitioner is informed and believes, subsequently offset and counterclaimed against the amounts of unmatured discounted paper upon which the name of the said bankrupt appeared as indorser, and your petitioner says that the said deposits were in effect a transfer to the said bank of the property of the said bankrupt, the effect of which transfer, if permitted to stand, will be to enable the said bank to obtain a greater percentage of its debt than any other creditor of the same class, the said bankrupt having given the said preference and the said bank receiving it, having had reasonable cause to

believe that it was intended thereby to give a preference in violation of the provisions of the bankrupt statute.

5. And your petitioner further says that the said bank had not the right to offset and counterclaim the amounts due upon unmatured paper upon which the name of said bankrupt appeared as indorser against the amount due upon deposit to the said bankrupt at the time of the filing of the petition in bankruptcy, for the reason that the respective obligations did not constitute mutual debts and mutual credits between the estate of the bankrupt and a creditor; that at the time of the filing of the said petition the account could not be stated and one debt set-off against the other within the meaning of the bankruptcy statute.

6. And your petitioner further says that the said amounts represented by the negotiable paper not matured did not represent a provable debt against the estate of the bankrupt as required by the bankruptcy statute in cases of set-offs and counterclaims.

7. And your petitioner further says that on the 18th day of March, 1903, Peter Alexander, receiver of the above named bankrupt, served a certified copy of the order of his appointment upon the said bank, as deponent is informed, by a reading of the report of said Receiver, and thereby became entitled to the balance of the deposit in favor of the said Phillip Semmer Glass Company, Limited, which the said bank had in its possession and which the said bank admitted three days later, to wit, the 21st day of March, 1903, amounted to the sum of $6,232.96.

8. And your petitioner further says that the said bank had no right to hold said deposit against the maturing of any negotiable paper upon which the name of the said bankrupt appeared, which had not become due at the time of the filing of the copy of the said Receiver's appointment.

9. And your petitioner further says that the said bank having received the said preference and transfers, as heretofore alleged herein, has not surrendered such preferences and

transfers as required by the bankruptcy statute as a condition precedent to the proving of said claim.

10. And your petitioner further says that in divers other respects the said proof of claim is objectionable and it should not be allowed.

That the attorneys of said creditor are Wilson & Wallis, 48 Wall Street, New York.

That no previous application has been made to this or any other court for the order hereinafter asked.

Wherefore your petitioner prays that the said proof of claim be reconsidered and rejected.

MARTIN CONBOY,
Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York. } ss :—

I, MARTIN CONBOY, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true according to the best of my knowledge, information and belief,

MARTIN CONBOY.

Subscribed and sworn to before me this 12th day of September, 1903.

EDWARD T. MAGOFFIN,
Notary Public,
New York Co.

Order of Referee Allowing Claim.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
OF
PHILLIP SEMMER GLASS COMPANY,
LIMITED,
Bankrupt.

At the City of New York, in said district, on the 13th day of May, 1904:

The trustees of the above named bankrupt having filed a petition and notice for the re-examination and rejection of the claim of the First National Bank of Jersey City, a creditor, against the estate of the said bankrupt; now, upon the evidence submitted to this Court upon the said claim and upon hearing counsel therein, it is

Ordered, that the amount of the said claim be reduced from $9,080.03, as set forth in the affidavit in proof of the claim filed by said creditor by deducting therefrom the sum of $110.76, the interest on the several notes set forth in the said affidavit between the date of filing the petition and the maturity of the notes, respectively, and by deducting the further sum of $450, the amount of the note of George H. Payne, which, as stipulated by counsel, has been collected by the creditor since the filing of its claim, making a total deduction of $560.76, and that the said claim as so reduced, amounting to $8,519.27, be and it is hereby allowed, and that the last mentioned sum be entered upon the books of the trustee as the true sum upon which dividends shall be computed.

MACGRANE COXE,
Referee in Bankruptcy.

Opinion of Referee.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF PHILLIP SEMMER GLASS CO., LIMITED, Bankrupt.	In Bankruptcy, No. 5757.
CLAIM OF FIRST NATIONAL BANK OF JERSEY CITY.	

WILSON & WALLIS, for the bank.
FRANK A. CLARY, for the trustee.

MACGRANE COXE, Referee:

This is on the application of the trustee in bankruptcy for the re-examination of the claim against the bankrupt estate of the First National Bank of Jersey City.

The petition in bankruptcy, which was involuntary, was filed March 18, 1903. For some time prior to that date, the bankrupt had had a deposit account in the claimant bank, and on said March 18, 1903, there was a balance due to the bankrupt from the bank on this account of $6,232.96. On the same day the bank held unmatured promissory notes made by various makers in favor of the bankrupt, which it had, upon endorsement by the bankrupt, and, in the ordinary course of business, discounted for the bankrupt's account, and on which the bankrupt had received from the bank a sum largely in excess of the balance above mentioned. This balance the bank applied to the payment of these notes as far as it would go, and it has filed its claim, which is the subject of this proceeding for the remainder of the notes, amounting in all, including interest and protest fees, to $9,080.03. The notes

all fell due within one year after the adjudication in bankruptcy. Payment thereon respectively was duly demanded and refused, and notice of protest given to the bankrupt as endorser.

The objections of the trustee are based upon the fact that the notes were unmatured on the day the petition in bankruptcy was filed. He urges that, for this reason, it was not within the right of the bank to offset the deposit in its hands against the indebtedness of the bankrupt on the endorsements, and that should it be permitted to do so, the result would be an unlawful transfer and a preference of the bank to the extent of the deposit over the bankrupt's other creditors of the same class.

It seems now well settled, and, indeed, the trustee does not deny that, had the notes fallen due before instead of after the filing of the petition, the offset would have been proper. There are a number of decisions to this effect, both under the present and the former Bankruptcy Acts (Hough v. First National Bank, 4 Biss., 349; Blair v. Allen, 3 Dill., 101; *In re* Farnsworth, 5 Biss., 224; *In re* Little, 6 Am. B. R., 681, 692; 110 F. R., 621; *In re* Elslasser, 7 Am. B. R., 215.) And so, finally, is the decision of the Supreme Court of the United States in the recent case of New York County National Bank v. Massy (11 Am. B. R., 42; 192 U. S., 138). The ground of the decision in this last case is that the bankrupt's deposit in the bank, under the circumstances, did not constitute a transfer as defined by the Bankruptcy Act, for the reason that the estate of the bankrupt was not diminished thereby, the bankrupt being at liberty freely to check against the deposit in the bank up to the time of the institution of the bankruptcy proceedings. The Court thereupon held that there was such mutuality between the two debts as permitted one to be set-off against the other under Section 68 of the act.

This decision disposes of the objection of the trustee that the deposit here was a preferential transfer, and we have remaining only the question as to whether the fact that the notes here were unmatured at the time of the filing of the petition in bankruptcy eliminates that quality of mutuality which is required by Section 68, in order to permit of set-off.

The trustee's contention is that on the day of

the filing of the petition there was no such mutuality; that there was, on that day, a debt due by the bank to the bankrupt, but no debt due by the bankrupt to the bank. He further contends that immediately upon the filing of the petition in bankruptcy other and paramount equities in favor of the general creditors of the bankrupt intervened, and became superior to the equities existing between the bankrupt and the bank; and that immediately thereupon the fund in the bank became impressed with a trust in favor of the general creditors of the bankrupt and could not be retained by the bank alone.

The trustee in support of this contention cites authorities of the New York and Pennsylvania courts, and there is no doubt that under the statutes of those States, the law is as he declares it to be. But the Bankruptcy Act creates a different rule of set-off, or rather, perhaps, better, adds to the classes of cases to which the rule is to be applied.

At common law, and under the statutes of New York and of other States, it is well settled that there can be no set-off unless the mutual debts are both due and payable in the hands of the parties for and against whom set-off is sought, that is to say, that unless they are precently payable as well as due the requisite mutuality does not exist (Munger v. Albany City Bank, 85 N. Y., 580–586). Under the Bankruptcy Statute, however, by Section 63*a*, a debt is declared provable against the bankrupt estate, that is, I take it, for the purposes of bankruptcy, payable out of the estate, although not by its terms payable until after the filing of the petition, if only it be absolutely owing at that time. The operation of this section seems to be to hasten in such cases, and for the purposes of bankruptcy administration, the maturity of the debt.

In the case of Meyer v. Dickinson, 5 Am. B. R., 593; 107 F. R., 86, Judge THOMAS maintained the right of set-off in such a case as the one under consideration against unmatured paper of the bankrupt firm, holding that upon the institution of bankruptcy proceedings another and different rule of set-off applied from that existing under the statutes of Pennsylvania.

It seems to be the provability of the debt which is the criterion of its availability for the purposes of set-off. It was so said *In re* Kalter, 2 N. B. N., 264, in which case such an offset as is sought here was upheld. The fact

that Section 68*b* prohibits a set-off of any debt which is not provable would point inferentially to the same conclusion.

There seems now to be no question, though it was at first much doubted, that the claim of the bank in this case is a provable claim, notwithstanding the immaturity of the paper at the date of the commencement of the bankruptcy proceedings. It was so held *In re* Gersen, 6 Am. B. R., 11; 107 F. R., 897. The Circuit Court of Appeals for the Third Circuit in that case, affirming the District Court, holds that the liability of a bankrupt endorser of commercial paper can be proved against his estate in bankruptcy, although the paper did not fall due until after the filing of the petition.

Nor should we overlook the use of the term "mutual credits" in addition to the term "mutual debts" in Sec. 68. While these terms are to be used as correlatives (Libby v. Hopkins, 104 U. S., 303), they are not to be construed as meaning one and the same thing (Lord KENYON in Atkinson v. Elliott, 7 T. R., 378). The term mutual credits first appears in the English Bankruptcy System in the year 1705 (4 & 5 Anne, C. 17, Sec. 11), and it has been found in all of our bankruptcy acts from the beginning (Act of 1800, Sec. 42; Act of 1841, Sec. 5; Act of 1867, Sec. 20; U. S. R. S., Sec. 5073). It has from the first been considered of importance, and as adding materially to the cases which were held comprised under the terms mutual debts. Thus, Robson on Bankruptcy, 7th Edition, p. 365, says:

"The right of set off given by the Bankruptcy laws, not being confined, as in the statutes of set-off, to mutual debts, but being extended to mutual credits * * * it necessarily applies to a much larger number of demands than is comprised in the term mutual debts. * * * One of the earliest questions which arose on the mutual credit clause was whether a debt payable *in futuro* could be set-off against a debt payable *in præsenti*. And this was decided in the affirmative on the ground that, though there might not be mutual debts actually payable between the parties, still there were mutual credits, and that the case came within the equities of the statute."

Under Sec. 20 of the Act of 1867, the language of which is substantially the same to that of Sec. 68 of the present act, such an offset as is here sought by the bank against an unmatured obligation was upheld (*Ex parte* Howard National Bank, 2 Lowell, 487; *In re* Petrie, 5 Ben., 110).

On the whole, I conclude that the mutuality required by the Bankruptcy Act existed, and that the offset was proper.

Objection is further made by the trustee, as to several of the notes, that they had not become due even at the time of the proof of claim was made, June 11, 1903. This is true, but they had all become due before the proof was closed in this proceeding, and it appears from the record that these notes, like the others, had been duly protested for non-payment, with notice to the bankrupt. These notes, therefore, are substantially in the same situation as the others, and it follows that the same rules should apply to them.

All of the notes we have seen fell due within one year from the date of the adjudication It is not, therefore, necessary to decide, and is not decided what would be the result were this not the case, as affected by Section 57*n* of the Bankruptcy Act.

There should, however, be a deduction from the claim as filed. Under Section 63*a* there should be a deduction of interest on the several notes between the date of the filing of the petition and the maturity of the notes, respectively. This amounts to $110.76. and should be deducted from the amount of $9,080.03, set forth in the claimant's proof of claim. With this deduction the claim should be allowed.

An order may be submitted accordingly on notice or consent.

New York, May 7, 1904.

MACGRANE COXE,
Referee in Bankruptcy.

Order of District Court affirming referee.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Post Office Building, in the City of New York, on the 7th day of June, 1904.

Present: HON. GEORGE C. HOLT, District Judge.

IN THE MATTER OF THE PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	In Bankruptcy No. 5757.

On reading and filing the petition of Martin Conboy, trustee of the above named bankrupt, verified the 17th day of May, 1904, and notice of motion thereon to review the order made by the Referee herein on the 13th day of May, 1904, allowing the claim of the First National Bank of Jersey City, as reduced by said order; and on the said order and all proceedings therein referred to; and on hearing counsel for the said trustee and said creditor, it is

Ordered, that the said order be and is hereby affirmed.

GEORGE C. HOLT,

J.

Appeal of Trustee to Circuit Court of Appeals.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LTD, Bankrupt.	In Bankruptcy, No. 5757.

Petition on appeal of Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt.

The above named Martin Conboy, Trustee in Bankruptcy, considering himself aggrieved by the judgment made and entered on the 7th day of June, 1904, in the above entitled action, confirming the order of the Referee allowing the claim herein of the First National Bank of Jersey City in the sum of $8,519.27, does hereby appeal from such judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which the said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

FRANK A. CLARY,
Attorney for Martin Conboy,
Trustee in Bankruptcy.

The foregoing claim of appeal is allowed.

GEO. C. HOLT,
District Judge.

[ENDORSED:] Petition on Appeal.—Filed June 11, 1904.

Assignment of Errors on Appeal to Circuit Court of Appeals.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	In Bankruptcy, No. 5757.

And now on the 9th day of June, 1904, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, bankrupt, by Frank A. Clary, Esq., his solicitor, and says:

That the judgment entered in said cause on the 7th day of June, 1904, confirming the order of the Referee, allowing the claim of the First National Bank of Jersey City, is erroneous and against the just rights of the said Trustee in Bankruptcy for the following reasons:

FIRST:—Because the evidence shows that at the time of the filing of the petition in bankruptcy said bankrupt had on deposit in said bank the sum of $6,232.96. That at said time of the filing of the petition in bankruptcy the bank held certain promissory notes in an amount greater than such deposit which notes were made to the order of the bankrupt and had been theretofore endorsed by the bankrupt to the bank, and upon which notes the bankrupt was then liable to the bank as endorser.

That the Receiver of the bankrupt demanded such deposit from the bank immediately after the filing of said petition in bankruptcy but the bank refused to surrender or pay the same and forthwith, and before the maturity of any of said notes, applied the said deposit upon and against the bankrupt's said liability to the bank as endorser on certain of said notes.

The Court erred in holding and adjudging that the said bank had the right to make such set-off under Section 68*a* of the Bankruptcy Act.

SECOND :—Because the evidence shows the facts recited in the first assignment of error herein and the Court erred in holding and adjudging that the application of the amount of such deposit as aforesaid to the payment of the bankrupt's liability as endorser of certain of the promissory notes, so as aforesaid in possession of said bank, and not matured at the date of the filing of the petition in bankruptcy, was not an undue and unlawful preference within the meaning of the Bankruptcy Act and in allowing the bank to prove any claim against the estate of said bankrupt before the re-payment to the said estate of the amount so applied on the said promissory notes.

Wherefore, the said Martin Conboy, Trustee in Bankruptcy of said Phillip Semmer Glass Company, Limited, bankrupt, prays that said judgment affirming the action and ruling of the Referee allowing the claim of said the First National Bank of Jersey City in the sum of $8,519.27, be reversed and that the said Court may be directed to enter a judgment and order reversing the action, ruling and order of the Referee.

FRANK A. CLARY,
Solicitor for Martin Conboy, Trustee in Bankruptcy of the Phillip Semmer Glass Company.

Order of Circuit Court of Appeals Affirming Decree of District Court.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms in the Post Office Building in the City of New York, on the 23rd day of January, one thousand nine hundred and five;

Present:

HON. E. HENRY LACOMBE,
HON. WILLIAM K. TOWNSEND,
HON. ALFRED C. COXE,
Circuit Judges.

IN THE MATTER OF THE PHILIP SEMMER GLASS COMPANY, LTD., Bankrupt, MARTIN CONBOY, as Trustee, etc., Appellant.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

W. K. T.
E. H. L.
A. C. C.

ENDORSED: United States Circuit Court of Appeals, Second Circuit. Filed Jan. 23, 1905. William Parkin, Clerk.

Opinion of Circuit Court of Appeals.

UNITED STATES CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

Before LACOMBE, TOWNSEND and COXE, Circuit Judges.

IN THE MATTER

OF

PHILIP SEMMER GLASS CO.,
Bankrupt.

MARTIN CONBOY, Trustee,
Appellant.

This cause comes here on appeal from an order of the District Court, Southern District of New York confirming a report of Referee in Bankruptcy which allowed the claim of the First National Bank of Jersey City for $8,519.27 against the bankrupts' estate.

Per Curiam.

It seems unnecessary to add anything to the discussion of the case which will be found in the report of the Referee, 11 Am. Bank Rep., 665. It was held in N. Y. County National Bank v. Massey 192 U. S. 138 that, in the absence of fraud or collusion a bank which holds promissory notes of a bankrupt need not surrender a deposit balance standing to the credit of the bankrupt on the day of the adjudication in bankruptcy, but may set it off against said notes and prove for the amount remaining due after such set-off. The appellant seeks to differentiate the case at bar on the ground that the notes held by the First National Bank were not due, at the date of adjudication (they have since matured) and that the bankrupt was not the maker but the endorser—wherefore the notes did not constitute a "debt" of the bank-

rupt. His argument is interesting and ingenious but entirely disregards Section 1 subdivision 11 of the Bankruptcy Act, which provides that the word "debt" when used in said act "shall include any debt, demand, or claim provable in bankruptcy". That meaning must be given to the word when used in the set-off section (68): "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only shall be allowed or paid". To determine therefore whether the holder of a claim is entitled to the benefit of section 68 it is necessary only to enquire whether his claim is one provable in bankruptcy.

We concur with the Court of Appeals for the Third Circuit (Moch v. Market St. Nat. Bank, 107 F. R. 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy.

The order appealed from is affirmed with costs.

Order Circuit Court of Appeals Denying Motion to Recall Mandate.

At a Term of the Circuit Court of Appeals of the United States held in and for the Second Circuit at the Post-Office Building, in the City of New York, Southern District of New York on the 26th day of April, 1905.

Present:

HON. WILLIAM J. WALLACE,
" E. HENRY LACOMBE,
" WILLIAM K. TOWNSEND,
} Circuit Judges.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,
Bankrupt.

MARTIN CONBOY, Trustee,
Appellant,

vs.

FIRST NATIONAL BANK OF JERSEY CITY,
Claimant-Appellee.

This cause coming on to be heard on the petition of Martin Conboy, Trustee, for cancellation of the judgment entered herein, and the same having been duly considered,

Now, upon reading and filing the petition for a rehearing verified the 15th day of April, 1905, and the notice of motion thereon, dated the 13th day of April, 1905, and after hearing Martin Conboy, Esq., of counsel for the petitioner and William G. Wilson, Esq., in opposition thereto, and the Court being fully advised thereon, it is

ORDERED that the said petition to recall the mandate of this Court and to vacate the order for the same be and the same hereby is denied.

Order Circuit Court of Appeals Denying Petition for Rehearing.

At a Stated Term of the Circuit Court of Appeals of the United States held in and for the Second Circuit at the Post-Office Building in the City of New York, Southern District of New York on the 24th day of May, 1905.

Present:

HON. E. HENRY LACOMBE,
HON. WILLIAM K. TOWNSEND,
HON. ALFRED C. COXE,
} Circuit Judges.

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,

Bankrupt,

MARTIN CONBOY, Trustee,

Appellant,

AGAINST

FIRST NATIONAL BANK OF JERSEY CITY,

Claimant-Appellee.

The Court having rendered its decision on this appeal at said term, January 12th, 1905, and judgment thereon having been entered by the Clerk at said term, January 23rd, 1905, and the said Martin Conboy, Trustee, appellant, having presented a petition for a re-hearing at said term, and the said petition having been filed by the Clerk on the 8th day of May, 1905, and the Court having duly considered the said petition and having rendered its decision denying the said petition for a re-hearing at said term on the 17th day of May, 1905, it is

ORDERED that the said petition for a re-hearing on this appeal be and the same is hereby denied.

Petition of appeal to Supreme Court.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	Petition for Appeal.

MARTIN CONBOY, Trustee, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.	

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The appeal of Martin Conboy, the Trustee of the Phillip Semmer Glass Company, Limited, Bankrupt, respectfully shows:

That upon the 18th day of March, 1903, a petition in bankruptcy was filed against the Phillip Semmer Glass Company, Limited, and pursuant to said petition an order of adjudication was duly entered therein on the 4th day of April, 1903, the proceeding being in the United States District Court for the Southern District of New York.

For some time prior to the date of the filing of the petition, the bankrupt had an account with the First National

Bank of Jersey City, the claimant above named. On that date there was a balance due to the bankrupt from the claimant on this account of $6,232.96. On the same day, the bank held unmatured promissory notes made by various makers in favor of the bankrupt and, in the ordinary course of business, discounted for the bankrupt's account. The amount of these notes, so discounted, was $15,293.90. On the 12th day of June, 1903, a proof of debt was filed by the said claimant in the bankruptcy proceeding, in which the claimant alleged that the bankrupt was, at and before the filing of the petition in bankruptcy, indebted to the bank in the sum of $9,080.03, this amount being the aggregate of various notes of other parties endorsed by the bankrupt and discounted by the bank. The account between the bankrupt and the bank was the ordinary and usual deposit account between banker and depositor.

The trustee objected to the proof of claim and petitioned that it be disallowed for the reason that the bank had utilized the amount on deposit with it on the filing of the petition in bankruptcy in payment of other notes than those proved on, similarly made, endorsed and discounted which had not matured at the time of the filing of the petition.

After testimony was taken, establishing the above facts, the referee held that the claimant was permitted by the provisions of § 68 of the Bankrupt Act to set off against the unmatured obligations of the bankrupt, the amount on deposit to the credit of the bankrupt and denied the trustee's petition. The said referee held that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the said bankrupt, and that the same should be set off one against the other, and that the said First National Bank of Jersey City had properly filed its proof of claim for the balance only, and that the same was properly allowed and dividends should be paid thereon.

Thereafter the said trustee, feeling aggrieved by the action of the referee, sought a review of the decision of said referee by petition for that purpose and the matter coming on to be heard before the District Court of the United States in the Southern District of New York, the ruling of said referee was affirmed; and the trustee, still feeling himself aggrieved, ap-

pealed from the said order of the District Court to the Circuit Court of Appeals for the Second Circuit, and, the said appeal duly coming on to be heard, the said Circuit Court of Appeals affirmed the said order of the District Court, holding that the said notes and the said deposit account constituted mutual debts and mutual credits between the said First National Bank of Jersey City and the bankrupt and, on the 23rd day of January, 1905, an order was duly entered and filed by the said Circuit Court of Appeals affirming the order of the District Court and the ruling of the said referee as aforesaid.

That in view of the fact that no findings of fact and conclusions of law were filed by the said Circuit Court of Appeals prior to or at the time of the rendition of said judgment, the trustee, on or about the 25th day of April, 1905, petitioned the said Circuit Court of Appeals for the Second Circuit to recall its mandate and vacate the order for the same on the ground that the judgment rendered was irregular; that said petition came on to be heard on the said 25th day of April, 1905, and, after due consideration thereof, said motion was denied.

Thereafter and on the 8th day of May, 1905, said trustee presented a petition for re-hearing in due form to the said Circuit Court of Appeals for the Second Circuit, relying upon the decision of the Supreme Court of the United States in the case of Western Tie & Timber Co. v. Brown, 196 U. S. 502. That said petition was duly considered by the said Circuit Court of Appeals for the Second Circuit and, on the 24th day of May, 1905, an order, on their decision so rendered on the 17th day of May, 1905, was entered denying the same.

That, as the appellant, Martin Conboy, Trustee, is informed and believes, in the proceedings above recited, errors have been committed by the learned Circuit Court of Appeals in holding that the First National Bank of Jersey City had properly filed its proof of claim, and that the same was properly allowed and dividends should be paid thereon, by reason of all of which your petitioner has sustained grievous loss.

Wherefore this appellant appeals from the whole of the said order of affirmance of the Circuit Court of Appeals for the Second Circuit, dated the 23rd day of January, 1905, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 25th day of April, 1905, denying

the motion of your petitioner to recall the mandate of said court and cancel the order for same, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 24th day of May, 1905, denying the petition of the said trustee for a re-hearing; and respectfully prays that the said orders and decrees and the pleadings may be sent to the Supreme Court of the United States without delay and that the said Supreme Court will proceed to hear the said cause, and that the said orders and decrees of the Circuit Court of Appeals for the Second Circuit and every part thereof may be reversed and a decree made directing that the claim of the said First National Bank of Jersey City, as filed, be disallowed, and that your petitioner may such other and further relief in the premises as may be just.

Dated, May 24th, 1905.

FRANK A. CLARY,
Solicitor and Counsel for Appellant, Martin Conboy, Trustee,
27 Pine Street,
New York.

Allowed May 27, 1905.
R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.

Certificate of Mr. Justice Peckham.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	Certificate of Justice of the Supreme Court of the United States.
MARTIN CONBOY, TRUSTEE, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.	

In this cause, I hereby certify that, in my opinion, the determination of the question or questions involved in the allowance or rejection of the claim of the First National Bank of Jersey City is essential to a uniform construction of the Bankrupt Law throughout the United States.

This certificate is made conformably to Act of Congress of July 1, 1898, § 25–*b*, paragraph 2.

Dated this 27 day of May, A. D. 1905.

R. W. PECKHAM,
Asso. Jus. Sup. Ct. U. S.,
Washington,
D. C.

Assignment of Errors.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

IN THE MATTER OF PHILLIP SEMMER GLASS COMPANY, LIMITED, Bankrupt.	
MARTIN CONBOY, Trustee, Appellant, AGAINST FIRST NATIONAL BANK OF JERSEY CITY, Claimant-Appellee.	Assignment of Errors.

And now, on the 27th day of May, 1905, comes the said Martin Conboy, as Trustee in Bankruptcy of the Phillip Semmer Glass Company, Limited, Bankrupt, by Frank A. Clary, Esq., his solicitor and counsel, and says:—

That the judgment rendered in said cause on the 23rd day of January, 1905, affirming the order of the United States District Court, allowing the claim of the First National Bank of Jersey City, and the order entered in said cause on the 25th day of April, 1905, denying the motion of the said trustee to have the said Circuit Court of Appeals for the Second Circuit recall its mandate and vacate the order thereon, and the order entered on the 24th day of May, 1905, denying the petition for re-hearing, are erroneous and against the just rights of the trustee in bankruptcy for the following reasons:—

First. For that the said Circuit Court of Appeals finds that the unmatured notes held by the First National Bank of Jersey City against the bankrupt and the claim of the bankrupt against the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the same should be set off one against the other; and for the further reason that the said Court finds that the allowance of said set off was not an unlawful preference within the true intent and meaning of the Bankrupt Law.

And the said appellant prays that the orders aforesaid may be reversed, annulled and altogether held for naught and that he may be restored to all things which he has lost by reason of said orders.

Frank A. Clary,
Solicitor and Counsel for Appellant, Martin Conboy, Trustee,
27 Pine Street,
New York.

FILE COPY.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]54

Office Supreme Court U. S.
FILED
APR 19 1906
JAMES H. McKENNEY,
(Clerk)

IN THE MATTER

OF

PHILLIP SEMMER GLASS COMPANY, LIMITED,

Bankrupt.

MARTIN CONBOY, Trustee,

Appellant,

versus

FIRST NATIONAL BANK OF JERSEY CITY,

Claimant-Appellee.

BRIEF FOR APPELLEE.

WILLIAM G. WILSON,

Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

United States Supreme Court.

In the Matter

of

Phillip Semmer Glass Company, Limited,
Bankrupt.

Martin Conboy, Trustee,
Appellant,

vs.

First National Bank of Jersey City,
Respondent.

BRIEF FOR APPELLEE.

This is an appeal (27) from an order or decree of the Circuit Court of Appeals for the Second Circuit (21) affirming a decree of the District Court of the United States for the Southern District of New York confirming the report of a Referee in Bankruptcy, dated May 7, 1904, (2-5) allowing the claim of the First National Bank of Jersey City against the above named bankrupt at the sum of $8,519.27, and also from an order of said Circuit Court of Appeals (24) denying a motion of the appellant for a rehearing.

The decree of affirmance was made and entered January 23, 1905 (21).

The petition for rehearing was filed May 8, 1905; and the order denying same was made and entered May 24, 1905 (24).

Statement.

At the time when the petition in bankruptcy was filed against the Philip Semmer Glass Co., Limited, March 18, 1903, (29) that company, a dealer with the First National Bank of Jersey City, had on deposit with the Bank a balance to its credit of $6232.96. On the same day the Bank held unmatured promissory notes made in favor of the bankrupt Company which the Bank had, upon the endorsement of the Company, discounted for account of the Company, and upon these the Company had received from the Bank a sum largely in excess of this balance. This balance was applied by the Bank to the payment of these notes, so far as it would go, and the Bank filed its claim in bankruptcy against the bankrupt Company for the remainder of these notes, amounting, with interest and protest fees, to $9,080.03. The notes all fell due within one year after the adjudication in bankruptcy, and payment of each was duly demanded and refused, and notice of protest given to the bankrupt Company as endorser (30-31). A list of the notes is giving in the findings (30).

The Trustee moved to expunge the claim of the Bank on the ground that it was not within the right of the Bank to set off the deposit in its hands against the bankrupt Company upon its endorsements, and that, should it be permitted to do so, the result would be an unlawful transfer and a preference to the Bank to the extent of the deposit over the bankrupt's other creditors of the same class. This motion was denied and an appropriate order was entered (31). And it is this order which was successively reviewed and affirmed in the District Court and in the Circuit Court of Appeals, and the latter court has found the following Conclusions of Law (31) which this Court is now asked to review:

"1. That the claim of the First National Bank of Jersey City on account of the unmatured notes endorsed by the bankrupt and held by said bank and the claim of the bankrupt against the said First National Bank of Jersey City on its deposit account were mutual debts and mutual credits and that the said bank was entitled to set off one against the other.

"II. That the allowance of said set off is not an unlawful preference within the true intent and meaning of the Bankrupt Law."

The findings of the Circuit Court of Appeals were made to be included in the record on this appeal "*nunc pro tunc*" as though the same were made and filed at the time of the entry of the judgment of this Court on the 23rd day of January, 1905 (29).

POINT FIRST. The appeal was not taken within the time limited by the General Orders.

The decree from which the appeal is taken was entered January 23, 1905 (21).

The petition of appeal was dated May 24, 1905, and allowed May 27, 1905 (28).

The only authority for this appeal is found in the following provisions:—

Bankrupt Law, Section 25:—

"*b.* From any final decision of a court of appeals, *allowing or rejecting a claim* under this act, an appeal may be had under such rules and *within such time* as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

* * * * * * * *

"2. Where some Justice of the Supreme Court shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

General Orders in Bankruptcy, XXXVI.:—

"2. Appeals under the act to the Supreme Court of the United States from a circuit court of appeals * * * shall be taken *within thirty days after the judgment or decree*, and shall be allowed by a judge of the court appealed from or by a Justice of the Supreme Court of the United States."

It is obvious that the present appeal was taken *four months* "after the judgment or decree" appealed from, and therefore was not taken within the time limited.

The limitation of time fixed by the General Orders under the authority and direction of the Bankrupt Law has the same effect as if the time had been fixed in the first instance by the statute itself. The purpose of this limitation of thirty days is apparent. It is intended to compel prompt action and to prevent the tying up of bankrupt estates by prolonged litigation over disputed claims.

The allowance of the appeal and the certificate of the Justice of this Court cannot change the situation. The certificate merely declares that there is ground for an appeal in the nature of the questions involved. Its effect is necessarily subject, by the terms of the statute, to the provision the appeal founded upon or supported by such certificate must be taken "within such time as may be prescribed by the Supreme Court of the United States," and this Court has prescribed the time, and has limited it to thirty days. The formal allowance of the appeal is not an adjudication that the appeal is taken in time. That is a question of law to be passed upon by the Court.

The appellant seeks to save his appeal by referring the limitation to the date of the order denying his petition for a rehearing. And he has assumed to appeal from that order as well as from the judgment or decree allowing the claim.

No appeal lies from that order. *Brockett v. Brockett*, 2 How. 238. An application for a rehearing is addressed wholly to the discretion of the Court, and its purpose is only to afford the court to which it is addressed an opportunity to correct its own errors. It is designed to obviate the necessity for an appeal, and not to lay the foundation of an appeal.

The order denying the petition for rehearing is not the judgment or decree allowing the claim, but is merely the refusal of the Court to disturb the judgment or decree—allowing the claim—which it had made four months before. And it is from that judgment or decree, alone, that any appeal lies.

No reason is shown why the appeal was not taken within the thirty days after the decree. When that decree was entered the appellant had his option to take an appeal to this Court within the time limited, or to petition the Circuit Court of Appeals for a rehearing. Indeed, if he had acted promptly, as the time limitation was intended to compel him to do, he might have made his application for a rehearing and have had it determined within the thirty

days, and have still taken his appeal in time. And it is hardly to be supposed that the Circuit Court of Appeals, if its attention had been drawn to the situation, would not have decided the application in time to preserve his right of appeal beyond any question. If that Court had, in such case, failed to do so, a question might arise which does not exist now.

But here the appellant let the thirty days expire, and let the full period of three months expire, before he filed his petition for rehearing. The decree was entered January 23, 1905. The petition for rehearing was filed May 8, 1905. The time to appeal had expired more than two months before, on February 22, 1905. The right of appeal under the limitation of the General Orders had then been wholly lost.

The proposition that the appellant could lose his right of appeal by his own act in neglecting to take it in time, and then reinvest himself with that right by his own act in filing a petition for a rehearing does not commend itself as consonant with reason or with the principles upon which courts administer justice.

The limitation of the time to appeal is strictly analogous to the limitation upon the time for commencing an action. And, as to the latter, this Court said in *Bauserman v. Blunt*, 147 U. S. 647, 657 : "The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."

Cases are cited on behalf of the appellant which are claimed to support the conclusion that a motion for rehearing made at any time during the same term of the court in which the judgment appealed from is entered suspends the running of the period limited for taking the appeal. But this very statement of the appellant's position shows that the rule invoked has no application to the present case.

An application for rehearing cannot *suspend* the running of a period of limitation when that period has *already expired* before the application is made. To hold that it can would be a contradiction in terms, unsupported by authority, as will appear from an examination of the cases cited.

In *Brockett v. Brockett*, 2 How. 238, the leading authority, the decree was made on May 10, 1843, and the petition for rehearing was filed May 26, 1843, that is within sixteen days.

In *Aspen Co. v. Billings*, 150 U. S. 31, the decree was of Octo-

ber 20, 1890, and the petition for rehearing was filed five days later, October 25, 1890.

In *Voorhees v. Noyes Mfg. Co.*, 151 U. S. 135, the decree was made January 7, 1891, and the application for rehearing January 10, 1801, three days later.

In *Slaughter House Cases*, 10 Wall. 273, the judgments were entered April 11, 1870, and the petitions for rehearing were filed sixteen days later, on April 26, 1870.

In *Railroad Co. v. Bradleys*, 7 Wall, 575, the decree was made February 6, 1869. The motion to rescind or set aside the decree was made on March 6, 1869, twenty eight days after the entry of the decree.

In *Kingman v. Western Mfg. Co.*, 170 U. S., 675, the judgment was entered June 4, 1895, and motion for new trial was made two days thereafter, on June 6, 1895.

In *Texas & Pacific R'y Co. v. Murphy*, 111 U. S., 488, it was said: "The record does not show in express terms when the motion for a rehearing was made, but it was entertained by the Court and decided on its merits." It was therefore held that it was presumably filed in time.

In *Memphis v. Brown*, 94 U. S., 715, a judgment had been entered on March 2, 1876. A motion was made on May 20, 1876, to set it aside, and denied on the same day. The Court said: "We think that the order made by the Circuit Court, May 20, 1876, upon the motion to subject merchants' capital to the tax was such a final judgment as may be brought here for reexamination by a writ of error. The precise question decided by that order had never before been presented in the cause. The city was then for the first time required, in express terms, to subject this particular class of property to the adjudged taxation. The writ was, therefore, properly sued out upon the judgment. * * * The form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the Court had the right to do during the term for the very purpose of giving it effect for a *supersedeas*."

The language of the Court in *Sage v. Central R. R. Co.* 93 U. S. 412, 417, is directly in point. "A *supersedeas* is a statutory remedy. It is only obtained by a strict compliance with all of the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the court nor

the judges can disregard. If a delay beyond the limited time occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired, and of which he cannot be deprived without due process of law. * * * It would have been within the power of the Court to set aside the old decree and enter it over again, but this was refused."

The present case comes precisely within the terms of the decision last cited. The appellant, two months after his right to appeal had expired, petitioned the Circuit Court of Appeals to recall its mandate, and his petition was denied (27). That denial was, in effect, a refusal " to set aside the old decree and enter it anew."

And that court, in making its findings, carefully guarded against any other construction of its action by declaring (29) " we make the following findings of fact and conclusions of law to be included in the record on said appeal *nunc pro tunc* as though the same were made and filed at the time of the entry of the judgment of this court on the 23rd day of January, 1905."

And this was in recognition of the principle declared in the further language of the decision last cited, *Sage v. Central RR. Co.:* "The court can no more give effect to a *supersedeas* by ordering that the appeal relate back to a time within the sixty days, than it can to an appeal taken after the expiration of two years, by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, *it must appear that the delay was the act of the court,* and not of the parties."

Here the delay, continued for the whole period limited, and for two months in addition, was wholly the act of the appellant, and was incurred before the court was asked to reconsider its decision which is now sought to be reviewed.

POINT SECOND. The claim of the appellee was properly allowed.

It is not necessary to discuss the general subject of bankers' liens, for the precise question here presented is covered by the decisions in *N. Y. County Bank v. Massey,* 192 U. S., 138, *Moch v.*

Market Street National Bank, 107 Fed., 897, and *Frank v. Mercantile National Bank*, 182 N. Y., 264.

The appellant contends that as, independently of the provisions and purpose of the Bankrupt Law, set-off is ordinarily admitted only as between debts which have matured and presently payable, so the set-off provided for in the Bankrupt Law must be confined within the same limits.

Section 1 of the Bankrupt Law, defines the meaning of the word "debt," as used in the statute, thus "(11) debt shall include any debt, demand, or claim provable in bankruptcy."

Section 63 of the Bankrupt Law says: "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not; * * * (4) founded upon an open account or upon a contract express or implied."

And Section 68 of the Bankrupt Law reads:

"*a.* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed and paid.

"*b.* A set off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not *provable* against the estate."

Thus, Section 63 effectively declares that the maturity or non-maturity of the bankrupt's obligation does not affect its provability as a "debt," which term under Section 1 includes "any debt demand or claim provable"; andSection 68 permits set-off in the case of mutual debts so "provable."

Now, in *N. Y. County Bank v. Massey*, 192 U. S. 138, this Court said: "Section 68*a* of the bankruptcy act of 1898 is almost a literal reproduction of Section 20 of the Act of 1867. So far as we have been able to discover the holdings were *uniform* under that act that set-off should be allowed as between a bank and a depositor becoming bankrupt." "There is nothing in the findings to show fraud or collusion between the bankrupt and the bank with a view to create a preferential transfer of the bankrupt's property to the bank, and in the absence of such showing we cannot regard the deposit as having other effect than to create a debt to the bankrupt and not a diminution of his estate."

Among the decisions, under the act of 1867, are the following:—

In re Granger, 8 N. B. Reg. 30. "It clearly appearing from the proofs as well as from the allegations in the petition that these notes were negotiated to the bank by the bankrupts for a loan made to them and for their sole benefit, and that they are liable to the bank for the amounts specified in the notes, whether they are liable as endorsers or not," a petition to expunge the proof was denied.

In re Linn, 4 N. B. Reg. 46. "The 39th Section of the act provides that creditors whose debts are provable under the act may petition, and Section 19 authorizes debts not due to be proved. The 32d Section discharges the bankrupt from all debts which are provable. Literally construed, these provisions are wholly unambiguous, and authorize a creditor whose debt is not due to become a petitioner." And this was held to be the true construction of the act, upon a full discussion of the authorities and of the policy and purpose of the law, as distinguished from that of the common law which permits no action upon a debt before it becomes due.

In re City Bank, 6 N. B. Reg. 71. "The question whether a debt payable *in futuro* could be set off against a debt payable *in presenti* was one of the earliest which arose under the English bankrupt act. It was decided in the affirmative on the ground that though there might not be debts mutually payable between the parties there were mutual credits, and that the case came within the equity of the statute." "The same question has received a similar solution in the United States, under both the former and the present bankrupt acts." Upon a full discussion of the authorities, such right of set off was upheld.

Drake v. Rollo, 4 N. B. Reg. 686. A debt of the creditor, not due, was set off against a present debt of the bankrupt.

Ex parte Russell, 16 N. B. Reg. 476. Proof was allowed by Judge LOWELL of the endorsement of a note which had not matured at the date of the bankruptcy of the endorser.

In re Many, 17 N. B. Reg. 514, Judge BLATCHFORD allowed proofs on the same basis, upon notes made by the bankrupts and upon notes endorsed by them.

In *Mock vs. Market St. Nat. Bank*, 107 Fed. 897, it was said of the present act, by the Circuit Court of Appeals for the Third Circuit, as to the liability of a bankrupt endorser, whose liability did not become absolute until after the filing of the petition in bankruptcy, that such liability was clearly within the very words of the section, and that the claim upon it was provable. "The pri-

mary purpose of the bankrupt act was to relieve insolvent debtors from their pecuniary liabilities, and to secure ratable distribution of their estates among their creditors. It is not, then, to be lightly believed that congress intended to exclude from the operation and benefits of the act unmatured endorsements of commercial paper, which in every commercial community so often constitute a large proportion of the indebtedness of failing debtors. Of course, if not provable, such liabilities are not discharged. Now a construction leading to results so foreign to the general purpose of the law is not to be adopted unless plainly required by the language of the act. We cannot see that such an interpretation is demanded by anything contained in the act."

In the present case the Circuit Court of Appeals says, of the argument on behalf of the appellant, that it "entirely disregards section I subdivision 11 of the Bankruptcy Act, which provides that the word 'debt' when used in said act 'shall include any debt, demand or claim provable in bankruptcy.' That meaning must be given to the word in the set-off section. * * * To determine therefore whether the holder of a claim is entitled to the benefit of Section 68 it is necessary only to inquire whether his claim is one provable in bankruptcy. We concur with the Court of Appeals for the Third Circuit (*Moch v. Market St. Nat. Bank*, 107 F. R. 897) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy (20).

The uniformity of decision upon this point is recognized in *Frank v. Mercantile National Bank*, 182 N. Y. 264, 267, where it is said by CULLEN, C. J.: "The argument is that as unmatured claims against the bankrupt are provable against his estate, they necessarily are the subject of set-off under the provisions of section 68. We think that this position is well taken, but we shall refrain from entering into any discussion of the question, as the proposition seemed to be settled by decisions of the Federal Courts. The *uniform current of authority* of the District and Circuit Courts of the United States is to that effect and the law is so stated in the text books on bankruptcy. (*Re City Bank of Savings*, Fed. Cas. No. 2,742; *Ex parte Howard Nat. Bank*, Fed. Cas. No. 6,764; *Re Kalter*, 2 N. B. R. 264; *Re Little*, 6 Am. B. R. 681; *Myers v. Dickenson*, 5 Am. B. R. 595; *Union Nat. Bank v.*

McKay, 2 N. B. R. 913; *Re Phillip Semmer Glass Co.* 11 Am. B. R. 665; Collier on Bankruptcy [4th ed.], p. 498; Brandenburg on Bankruptcy, § 1131.)"

The argument for the appellant ignores the distinction between ordinary set off and that intended by the bankrupt law. The single point of difference lies precisely in this, that the bankrupt law deals with debts matured and unmatured upon the same basis, with proper adjustment of interest, in one case by the addition and in the other by the rebate of interest. In bankruptcy all debts are liquidated as of one and the same day, and every debt thus liquidated is discharged by the bankrupt's discharge.

The word "debt" is given a particular definition for the purposes of the act. It is a debt which is provable, whether matured or not. And section 68 goes so far as to direct that provable debts must be set off against debts due to the bankrupt "and *the balance only* shall be allowed or paid."

In other words, the bankrupt act makes all the debts of the bankrupt due as of the date of bankruptcy. Each creditor is entitled to a dividend, *pro rata* with the other creditors, upon the amount of his claim liquidated as of that day. And this was recognized in the report of the Referee in the present case where he says (5): "There should, however, be a deduction from the claim as filed. Under Section 63*a* there should be a deduction of interest on the several notes between the date of the filing of the petition and the maturity of the notes, respectively. * * * With this deduction the claim should be allowed."

In *Richards v. La Tourette*, 119 N. Y., 54, 59, Judge PECKHAM said referring to *Jordan v. Nat. Shoe and Leather Bank:* "Judge FOLGER in that case, said there was no foundation for the defendant's claim that it had a banker's lien on the funds of the depositor to secure the payment of a debt from the depositor not then due. It was a case, he said, which was to be decided by the statute of set off, and upon *that* statute there would be no pretense that it could be allowed. The opinion, however, distinctly recognizes the power of the Court to compel a set off *independently of any statute*, if facts for equitable interposition should be shown. None was pretended in that case. Insolvency was neither alleged nor proved."

In the case thus cited, *Jordan v. Nat. Shoe and Leather Bank*,

74 N. Y., 467, 475, it is said: "*Matthewson admr. v. Strafford Bank* (45 N. H., 108), is in accord with the position of the appellant. The opinion in that case, compares the statute of set-off of New Hampshire with that of Massachusetts, and finds them substantially alike; and citing some of the cases from the reports of the latter State, which are cited for the appellant here, declares that the right of set-off would be clear under the Massachusetts statute. But there does not seem to have been enough effect given to the fact, that of the Massachusetts cases it was said by SHAW, Ch. J., in *Bigelow v. Folger* (2 Metc., 255); that they did 'not stand upon the law regulating set-off generally, but upon the law respecting the settlement of insolvent estates.'"

And in this case of *Bigelow v. Folger*, the language of Chief Justice SHAW was as follows:

"The court are of opinion, that the defendant is entitled to set off his note against the amount due on his bond, and that it is immaterial, whether his note was due when this action was commenced, or not. This does not stand upon the law regulating set-off generally, but on the law respecting the settlement of insolvent estates. When an estate is represented insolvent, all mutual demands of every nature and kind are to be set off, and the balance only is the debt due from the estate, or to the estate, as it may be found." The note was given by plaintiff's intestate, whose estate was insolvent, and had some two years to run when the action was brought.

The decisions thus establish, beyond any question, that the subject of set-off has repeatedly been made matter of statutory regulation and control; that the statutes of Massachusetts regarding insolvency have for very many years permitted a creditor to set off the unmatured debt of the insolvent, and this in the plain interest of justice, that the creditor should not be required to pay his own debt in full and take back in return a dividend upon his claim; that, as said by the Court in *Jordan v. Nat. Shoe and Leather Bank*, which was decided upon the effect of the New York statute of set-off, "Doubtless the power to compel a set-off of debts, was exercised by equity, prior to, and independent of, any statute on the subject. But equity *follows the statute* and the law;" that the bankrupt law of 1867, to a considerable extent modeled on the insolvency law of Massachusetts, provided for set-off of debts of the bankrupt which had not matured, and was uniformly so construed; and that the present bankrupt act in "almost a literal reproduction of sec-

tion 20 of the act of 1867 " contains the same provision, and, upon every rule of reason and interpretation, should be held, and has been held, to have the same effect.

The decision of this Court in *Western Tie and Timber Co. v. Brown*, 196 U. S., 502, has absolutely no bearing upon the present case. What is said there and in the other cases upon which the appellant appears to rely, as to the underlying principles of the law of set applies only to the question as to the relations between the parties essential to the allowance of *any* set-off. That case simply held that money in possession of the creditor company, which was due from it to laborers in its employ, could not be retained by it and set-off against the bankrupt's indebtedness to the company because the laborers to whom it belonged were indebted to the bankrupt. That is, the decision was only an application of the fundamental principle that set-off is not available unless the debts and credits are *mutual*, and that a debt of C to A is not to be set off as against a debt of A to B. It has nothing to do with the proposition that debts which have not matured are the subject of proof and set-off under the terms of the bankrupt law.

And so in *Sawyer v. Hoag*, 17 Wall., 610, 622, where the Court says : " This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it," the meaning and application of this language is clearly shown by that which follows it : " The debts must be *mutual ;* must be in the same right. The case before us is not of that character."

Likewise in *Gray v. Rollo*, 18 Wall. 629, 631, the ground and point of the decision, is plainly expressed in the opinion of Mr. Justice BRADLEY, " It is clear that these claims are not mutual debts. They are *not between the same parties.* The notes exhibit a liability of the complainant and Gaylord, the policies, a claim of the complainant and his brother. * * * Nor does the case present one of mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. * * * There being neither mutual debts nor mutual credits, the case does not come within the terms of the Bankrupt Law." And, further : " We think the general rule is stated by Justice STORY in his treatise on Equity Jurisprudence, where he says : ' Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a

separate debt against a joint debt; or to state the proposition more generally, they will not allow a set-off of debts accruing in different rights.'"

Libby v. Hopkins, 104 U. S. 303, goes to the same question only, of the mutuality of the debts and credits.

In *Carr v. Hamilton*, 129 U. S. 252, 255, Justice BRADLEY, writing the opinion of the Court says: "Natural justice and equity would seem to dictate that the demands of parties mutually indebted should be set off against each other, and that the balance only should be considered as due. But the common law, for simplicity of procedure, determined otherwise, and held that each claim must be prosecuted separately. 'The natural sense of mankind,' says LORD Mansfield, 'was first shocked at this in the case of bankrupts; and it was provided for by 4 Ann., c. 17, § 11, and 5 Geo. II., c. 30, § 28.' *Green v. Farmer*, 4 Burrow, 2214, 2220, cited in 2 Story's Eq. Jur., § 1433; *S. C.*, 1 W. Bl., 651. In pursuance of these old statutes, and of the dictates of equity, the principle of set-off between mutual debts and credits has for nearly two centuries past been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute books; and *it mattered not whether the debt was due at the time of bankruptcy or not.*

If the argument upon this point appears to have been drawn out to unnecessary length, it is because of the persistance of the appellant in bringing to this Court, in the face of three successive adverse decisions below, a question which ought not to be regarded as open for present discussion. It is apparent from the foregoing authorities that the right of set-off which has been sustained herein is one which has been, for many years, firmly established.

If this be so, and if the appellant has taken advantage of his official position as trustee in bankruptcy to appeal to this Court without giving any security other than that afforded by his official bond,—and that is what he has done,—the question is fairly presented whether the case does not fall within the purview of the language of this Court in *Whitney v. Cook*, 99 U. S. 607: "Parties should not be subjected to the delay of proceedings for review in this court without reasonable

cause, and a power to make compensation for the loss occasioned by an unwarranted delay ought not to be overlooked."

The trustee in bankruptcy is a trustee for all the creditors. While it is his duty to object to proof of claims which are not lawfully allowable, he is not ordinarily justified in doing more than securing due and proper consideration of the questions presented and the determination of the bankruptcy court thereon. That determination affords the rule for both his guidance and protection, and establishes his duty to the creditors.

The general rule is that if a trustee goes further than this and contests the rights of his *cestuis que trustent*, after they have been judicially established by the court of which he is an officer, and contests, instead of obeying, the directions of that court, he does so at his peril.

POINT THIRD. The order or decree of the Circuit Court of Appeals should be affirmed or the appeal herein dismissed, with costs, and damages for delay.

WILLIAM G. WILSON,
Of Counsel.

Supreme Court of the United States.

No. 54.—October Term, 1906.

Martin Conboy, as Trustee in Bankruptcy of The Phillip Semmer Glass Company, Limited, Bankrupt, Appellant, *vs.* First National Bank of Jersey City. } Appeal from the United States Circuit Court of Appeals for Second Circuit.

[November 19, 1906.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This is an appeal from a final order of the Circuit Court of Appeals for the Second Circuit affirming an order of the District Court of the United States for the Southern District of New York, filed June 7, 1904, affirming an order of a referee in bankruptcy, "In the matter of Phillip Semmer Glass Company, Limited, Bankrupt," dated May 7, 1904, allowing the claim of the First National Bank of Jersey City against the bankrupt's estate.

The final order of the Circuit Court of Appeals was entered January 23, 1905. The trustee petitioned that court, April 25, to recall its mandate and vacate the order therefor, and the application was denied. On May 8 a petition for rehearing was filed, which was denied May 17, and an order to that effect entered May 24. A petition, dated the same day, was thereupon presented to a Justice of this court, praying an appeal "from the whole of the said order of affirmance of the Circuit Court of Appeals for the Second Circuit, dated the 23d day of January, 1905, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 25th day of April, 1905, denying the motion of your petitioner to recall the mandate of said court and cancel the order for same, and from the whole of the said order of the Circuit Court of Appeals for the Second Circuit, dated the 24th day of May, 1905, denying the petition of the said trustee for a rehearing;" and for the reversal of "said orders and decrees, &c., and every part thereof."

Appeal was allowed and certificate granted under § 25*b*, par. 2, of the Bankruptcy Act, May 27, 1905. Thereafter and on June 14, 1905, findings of fact and conclusions of law were filed by the Circuit Court of Appeals, "*nunc pro tunc*, as though the same were made and filed at the time of entry of the judgment of this court on the 23d day of January, 1905."

The following provisions of the bankruptcy act are applicable:

"SEC. 25*b*. From any final decision of a Court of Appeals, allowing or rejecting a claim under this act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other:

* * * * * *

"2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is essential to a uniform construction of this act throughout the United States."

Paragraphs 2 and 3 of General Orders in Bankruptcy, XXXVI, read:

"2. Appeals under the act to the Supreme Court of the United States from a Circuit Court of Appeals, or from the Supreme Court of a Territory, or from the Supreme Court of the District of Columbia, or from any court of bankruptcy whatever, shall be taken within thirty days after the judgment or decree, and shall be allowed by a judge of the court appealed from, or by a Justice of the Supreme Court of the United States.

"3. In every case in which either party is entitled by the act to take an appeal to the Supreme Court of the United States, the court from which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States on such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law."

The law provides that appeals shall be taken "within such time as may be prescribed by the Supreme Court of the United States," and by General Order XXXVI this court prescribed the time and limited it to thirty days, in harmony with the policy of the bankruptcy act, requiring prompt action and the avoidance of delay.

The limitation has the same effect as if written in the statute, and the allowance of an appeal on certificate cannot operate as an adjudication that it is taken in time.

The present appeal was allowed four months "after the judgment or decree" appealed from and three months after the time to appeal had expired.

But it is said that the limitation should be referred to the date of the order denying the petition for rehearing, and the trustee prayed an appeal from that order as well as from the judgment of January 23.

No appeal lies from orders denying petitions for rehearing, which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors. *Brockett* v. *Brockett*, 2 How. 238; *Wylie* v. *Coxe*, 14 How. 1. Appellant might have made his application for rehearing and had it determined within the thirty days, and still have had time to take his appeal. But he let the thirty days expire, as it did February 22, 1905, and did not file his petition until May 8, 1905. The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.

The cases cited for appellant, in which it was held that an application for a rehearing, made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired. "When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter." *Credit Company, Limited*, v. *Arkansas Central Railway Company*, 128 U. S. 258, 261.

In the circumstances, the suggestion that there is but one term of the Circuit Court of Appeals for the Second Circuit, and that, by the rules of practice of that court, petitions for rehearing may be presented at any time during the term, and therefore that this petition operated to enlarge the limitation of the bankruptcy act, is without merit.

The petition was denied. Whether it could have been granted in view of the terms and spirit of the bankruptcy act, or the effect, if it had been, we are not called upon to discuss.

Appeal dismissed.

True copy.

Test:

Clerk Supreme Court U. S.